Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

LAWRENCE N. BLUM, PH.D., *Petitioner*

v.

MICHAEL CROWE, STEPHEN CROWE, CHERYL A. CROWE, JUDITH ANN KENNEDY, SHANNON CROWE, AARON HOUSER, MARGARET SUSAN HOUSER, CHRISTINE HUFF, AND GREGG HOUSER, *Respondents*

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented For Review

1. Whether a private psychologist requested by the police to consult on a single interrogation of a criminal suspect in a murder investigation is entitled to assert qualified immunity pursuant to Richardson v. McKnight 521 U.S. 399 (1997).

2. Whether the holding and standards set forth for application of qualified immunity to private parties in Richardson v. McKnight 521 U.S. 399 (1997) should be clarified or re-examined due to the Circuit Courts' disinclination to extend qualified immunity to private individuals and the Ninth Circuit's blanket refusal to extend qualified immunity to private individuals.

3. Whether the tactics and lines of questioning employed during Plaintiffs' interrogations violated the Fourteenth Amendment shocks the conscience standard under prior precedent and this Court's decision in Chavez v. Martinez 538 U.S. 760 (2003).

4. Whether the law was clearly established that the tactics and lines of questioning employed during Plaintiffs' interrogations were a violation of the Fourteenth Amendment where the presiding Federal District Court, subsequent Ninth Circuit case law, and this Court in Chavez v. Martinez have indicated that such tactics and lines of questioning are not a violation of the Fourteenth Amendment.

List of Parties
Whose Judgment is Sought to be Reviewed

Lawrence N. Blum, Ph.D. seeks review of the Ninth Circuit Court of Appeals' reversal of the District Court's grant of summary judgment in Lawrence N. Blum, Ph.D.'s favor and against Plaintiffs Michael Crowe, Stephen Crowe, Cheryl A. Crowe, Judith Ann Kennedy, Shannon Crowe, Aaron Houser, Margaret Susan Houser, Christine Huff, and Gregg Houser.

Lawrence N. Blum, Ph.D. also joins in the Petitions filed by the Escondido and Oceanside parties seeking review of the Ninth Circuit Court of Appeals decision.

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Crowe v. County of San Diego 303 F.Supp.2d 1050 (S.D. Cal. 2004). Decided February 17, 2004.

Basis for Jurisdiction

The Ninth Circuit Court of Appeals decision was filed January 14, 2010 and amended January 27, 2010. The Second Amendment was filed on June 18, 2010. The Ninth Circuit denied the Petition for Rehearing on June 18, 2010.

28 U.S.C. § 1291 confers jurisdiction on this Court to review the Ninth Circuit's reversal of the District Court's grant of summary judgment in this matter. The basis for federal jurisdiction in the District Court was asserted under 28 U.S.C. § 1331, 28 U.S.C. § 1343, and 28 U.S.C. § 1367.

STATEMENT OF THE CASE

I.
INTRODUCTION

Lawrence N. Blum, Ph.D. is a private psychologist who consulted with the Escondido Police Department on a single case involving the interrogation of Michael Crowe whom the Police suspected brutally murdered his 12-year-old sister, Stephanie Crowe, in their home on the evening of January 20, 1998. Michael Crowe and two of his friends who were also accused of Stephanie's murder, and their respective family members, brought claims under 42 U.S.C. § 1983 against Dr. Blum arising out of the limited consultation he had with the Escondido Police regarding a single interrogation of Michael Crowe.

In reversing Dr. Blum's successful Motion for Summary Judgment on all of Plaintiffs' § 1983 claims, the Ninth Circuit Court of Appeals did not apply the doctrine of qualified immunity to Dr. Blum as a private individual. The case against Dr. Blum directly implicates this Court's decision in Richardson v. McKnight 521 U.S. 399 (1997) addressing the availability of qualified immunity for private individuals in § 1983 lawsuits. In particular, Dr. Blum's involvement in the Escondido Police's murder investigation fell squarely within the Richardson majority's caveat of "a private individual briefly associated with a government body, serving as an adjunct to government in an essential governmental activity, or acting under close official supervision." Richardson, supra at p. 413. Moreover,

a review of federal circuit law decided after Richardson, especially from the Ninth Circuit, reveals that in virtually every case the Courts have held that qualified immunity is not available to a private individual which calls into question the practical feasibility of applying the majority's historical/policy approach as opposed to the functional approach advocated by the four dissenting Justices in Richardson.

This Court should grant review to determine important constitutional questions still unanswered by the Richardson decision, to clarify the scope of the caveats set forth by the majority Opinion, and to examine whether the current standard provides sufficient certainty for lower courts and just results for private individuals assisting police in criminal investigations.

II.
STATEMENT OF FACTS

Lawrence N. Blum, Ph.D. is a clinical psychologist licensed by the State of California who maintains a private psychology practice in the Los Angeles area. Dr. Blum's practice consists of treating and counseling law enforcement officers who suffer from stress and trauma associated with the officers' work environment and experiences. Dr. Blum is not an interrogation specialist and prior to the Stephanie Crowe murder investigation had never consulted with any law enforcement agency regarding the interrogation of a criminal suspect. [App. 346]

On January 23, 1998, Dr. Blum was contacted by Sergeant Phillip Anderson of the Escondido Police Department about an interview they were going to conduct with Michael Crow whom they suspected of murdering his 12-year-old sister Stephanie. Dr. Blum met with Sgt. Anderson, Detective Ralph Claytor, and Detective Mark Wrisley at the Escondido Police Department. The officers showed Dr. Blum a videotaped portion of the previous interrogation of Michael Crowe and provided Dr. Blum with background information regarding Michael Crowe and his relationship with his family. Based upon that information, Dr. Blum commented to the police that Michael Crowe was probably somewhat alienated from peer group relationships with his family, that he appeared to be more involved in fantasy video games as opposed to family activity, that he likely withdrew to fantasy games as a comfort of some kind, and that his persistent drop in grades could be a sign of some psychological or emotional crises. [App. 17, 332]

Dr. Blum provided the detectives with this analysis of Michael Crowe's personality or character as opposed to specific interview techniques and discussed broad-brushed themes of which the officers already had an understanding. Dr. Blum suggested that the detectives address Michael Crowe in terms of analogies he would understand and that it was up to the detectives' independent judgment as to how to utilize that advice during the interrogation. One of the detectives has referred to the foregoing consultation with Dr. Blum prior to the interrogation as the development of a "tactical plan." [App. 17, 332]

Dr. Blum observed a portion of the January 23, 1998 interrogation of Michael Crowe conducted by Detectives Claytor and Wrisley. Dr. Blum did not interrogate Michael Crowe at any point in time. Dr. Blum did not direct or advise the police as to the length or timing of the interview with Michael Crowe, the manner in which Michael Crowe should be treated during the interview, or any questions which the detectives should ask Michael Crowe. Dr. Blum did not direct or advise the detectives that they should confront Michael Crowe with forensic evidence of his guilt, that they should threaten him in any manner, that they should promise him any leniency, or that they should lie to or deceive him. Detectives Claytor and Wrisley testified that the January 23, 1998 interrogation of Michael Crowe was based upon their own independent judgment and was not under the direction and control of Dr. Blum. [App. 284, 297]

Dr. Blum did not consult or participate in any manner in any other interrogations conducted by the Escondido Police Detectives, including the three pre-January 23 interrogations of Michael Crowe, the 1½-hour and 9½-hour interrogations of Aaron Houser,[1] or the 13½-hour and 12-hour interrogations of Joshua Treadway.

Michael Crowe, Aaron Houser and their family members have alleged a variety of claims against Dr. Blum under 42 U.S.C. § 1983. Dr. Blum asserted that he is entitled to qualified immunity on Plaintiffs'

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[1] Although Dr. Blum had nothing to do with Aaron Houser's interrogations, the arguments raised in this Petition are fully applicable to Houser's interrogations and claims against Dr. Blum.

§ 1983 claims before both the District Court and the Ninth Circuit. Neither Court applied qualified immunity to the claims asserted against Dr. Blum.

III.
THE LOWER COURT DECISIONS

The District Court granted summary judgment in favor of Dr. Blum on all claims made by Plaintiffs. The Ninth Circuit Court of Appeals reversed the District Court on Plaintiffs' conspiracy claims only.

A. The District Court Decision Granting Summary Judgment to Dr. Blum

The District Court, Honorable John S. Rhodes, granted summary judgment to Dr. Blum on each and every claim alleged by Plaintiffs. [App. 354]

With respect to the Fourth Amendment § 1983 claims raised by Plaintiffs, the District Court noted that it was undisputed that Dr. Blum did not physically participate in the arrests of the boys or the searches of their residences. [App. 213] The District Court further determined that under Ninth Circuit law, in any § 1983 action against a private individual the plaintiff must establish that the private individual was a proximate cause of the Constitutional violation. [App. 214] The District Court held:

> "Here, there is absolutely no evidence that defendant Blum had any control over the other defendants' decision to conduct the challenged searches and

> arrests. Accordingly, as a matter of law, defendant Blum did not proximately cause any Fourth Amendment violation and thus is entitled to summary judgment with respect to the Fourth Amendment claims of all three boys." [App. 214-215]

As to Plaintiffs' Fifth Amendment claims arising out of the alleged coercive interrogations, the District Court again determined that there was no evidence that Dr. Blum was the cause of any Fifth Amendment violation. The District Court held:

> "As for defendant Blum, as noted in section I.A. *supra*, defendant Blum, as a private actor, is not the proximate cause of a constitutional violation committed by a state actor unless he 'had some control over' the state actors' decision to commit the unconstitutional act. *See Franklin*, 312 F.3d at 446. There is no evidence in the record suggesting that defendant Blum had such control over the police officer defendants." [App. 284]

With respect to Plaintiffs' Fourteenth Amendment claims, the District Court held that the evidence was insufficient to meet the rigorous shocks the conscience standard necessary for a violation of the Fourteenth Amendment. In its detailed decision the District Court held:

"Having viewed the videotaped interviews and interrogations of Joshua Treadway and Aaron Houser in their entirety,[2] and having also reviewed the transcripts thereof, the court concludes that defendants' behavior during the interviews and interrogations, although not commendable, was not 'so egregious, so outrageous that it may fairly be said to shock the contemporary conscience.' [citation omitted] While it cannot be forgotten that the boys were juveniles at the time of the interrogations, and while some of the interrogations were long, the manner of interrogations was neither egregious, outrageous, nor shocking. This is not a case of physical or psychological torture. Defendants never yelled at the boys or even raised their voice. The boys were given food and water and bathroom breaks, even if not always immediately. Although the police may lied at times, such conduct is not outrageous and, in fact, does not even necessarily amount to coercive conduct. [citation omitted] Similarly, it is not outrageous that defendants attempted to extract confessions from the boys by telling them that they could

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[2] The District Court reviewed the videotapes of the entire interrogations in open court with an invitation to all counsel that they may be present.

> get treatment rather than jail if they confessed given that the Ninth Circuit recently found that similar statements do not even rise to the level of being coercive. [citation omitted] Moreover, although the boys became emotional at times during the questioning, the use of questions that elicit an emotional response does not transform the interrogation into one that 'shocks the conscience.' [citation omitted] Finally, although defendants employed a 'good cop/bad cop' approach during some of the interviews, such a manner of interrogation is relatively common and certainly not shocking, even when juveniles are involved." [App. 291-293]

In addition, the District Court determined that at least as to the police officers, qualified immunity would entitle them to summary judgment on Plaintiffs' Fourteenth Amendment claims.

> "Moreover, even if it were determined that defendants' conduct did violate the boys' Fourteenth Amendment substantive due process rights, a reasonable officer would not have known that the interrogation of the boys amounted to a violation of their Fourteenth Amendment rights of substantive due process given that the interrogations lacked the brutality that has previously marked the police

> conduct found by the courts to be 'shocking to the conscience.'" [App. 295-296]

With respect to Michael Crowe's Fourteenth Amendment claim, the Court determined that there was no concrete evidence that Dr. Blum engaged in any conspiracy to violate Michael Crowe's rights to be free from government conduct that shocks the conscience and furthermore that Dr. Blum did not engage in any behavior that shocked the conscience. In particular, the District Court found:

> "The Crowe plaintiffs' claims against defendants Blum and McDonough appear to be predicated upon the conduct of Michael's interrogation. A review of the record reveals no concrete evidence of a conspiracy encompassing the violation of Michael Crowe's Fourth [sic] [Fourteenth] Amendment right to be free of government conduct that 'shocks the conscience' of which these defendants were a part.
>
> Moreover, neither defendant himself directly engaged in conduct that 'shocks the conscience.' The purpose of an interrogation is procure a confession. Therefore, it does not 'shock the conscience' that defendant Blum provided the police with advice regarding how to best procure a confession from Michael Crowe based on

> Michael's psychological makeup where there is no evidence that defendant Blum advised using the type of 'brutal' techniques that have been held to violate the Fourteenth Amendment substantive due process clause. ... . Because defendant Blum and McDonough did not engage in behavior that 'shocks the conscience' so as to support a claim for violation of the Fourteenth Amendment substantive due process clause, these defendants are entitled to summary judgment." [App. 297]

With respect to Aaron Houser's defamation claims against Dr. Blum arising from his comments to the police, the District Court granted summary judgment in favor of Dr. Blum on First Amendment grounds. [App. 333-336]

Finally, the District Court addressed Plaintiffs' claims that Dr. Blum engaged in a conspiracy to violate Plaintiffs' civil rights, holding that there was no evidence that Dr. Blum was involved in such a conspiracy. The District Court held:

> "As noted in section I.A., *supra*, plaintiffs allege that there was a 'common objective to convict and incarcerate the boys' and that defendant Blum was a part of this 'scheme to blame and punish the boys' for Stephanie's murder. [citation omitted] According to plaintiffs, the objective of

the conspiracy was to be accomplished by means of illegal interrogations, arrests, searches, and seizures.

Here, although defendant Blum participated in the interrogation of the boys, there is absolutely no evidence that he was even aware of the alleged conspiracy or its objectives, let alone that he was a part of this conspiracy. ....

First, defendant Blum did not have a prior relationship with the other defendants from which one could infer that he was a participant in the alleged conspiracy to wrongfully arrest the boys or that he would have any interest in participating in a conspiracy which, plaintiffs contend, was directed at protecting Officer Walters and the Escondido Police Department from criticism. ...

Finally, it should be emphasized that even if by giving the advice he gave, defendant Blum violated the boys' Fifth Amendment rights (which the court has concluded he did not), to be held liable for false arrest/false imprisonment, the evidence must disclose not only that defendant Blum's actions were illegal but that his conduct was 'in furtherance of a common agreement or understanding to achieve the unlawful

> purpose of the Escondido defendants. [citation omitted] As stated, there is simply no evidence that defendant Blum's participation in the interrogation of Michael Crowe, whether constitutional or not, was in furtherance of a common agreement or understanding to achieve the alleged unlawful purpose of the Escondido defendants in pursuing the arrests and prosecution of the boys.
>
> Because no reasonable factfinder could find that defendant Blum was a participant in the alleged conspiracy, defendant Blum is entitled to summary judgment with respect to the boys' false arrest/false imprisonment claim." [App. 345-347]

The District Court granted Dr. Blum's Motion for Summary Judgment as to all claims by Plaintiffs. [App. 354]

B. The Ninth Circuit Reversal of Summary Judgment on the Conspiracy Claim

The Ninth Circuit Court of Appeals reversed the District Court's grant of summary judgment to Dr. Blum on Plaintiffs' conspiracy claim alone. In contrast to the District Court's extraordinarily detailed and thorough evaluation of Dr. Blum's conduct and involvement with the Escondido Police Department's investigation of Stephanie Crowe's

murder, the Ninth Circuit dedicated a single paragraph to Dr. Blum's involvement in this matter. The Ninth Circuit stated:

> "The record shows that the quality of Blum's involvement in the interrogations is not categorically inconsistent with a tacit 'meeting of the minds.' According to one of the detectives, Blum helped the police formulate a 'tactical plan' to approach the interview. Moreover, the detectives 'pretty much' followed his advice after these consultations. Insofar as these tactics and lines of questioning by the detectives shock the conscience, as demonstrated above, summary judgment in favor of Blum is unwarranted. A meeting of the minds can be inferred from circumstantial evidence, and Blum's involvement in the interrogations, particularly in formulating and directing the tactical plan, is sufficient for a reasonable factfinder to conclude that it was 'unlikely to have been undertaken without an agreement,' of some kind between the defendants. [citation omitted] We therefore reverse the district court's grant of summary judgment on this point." [App. 67-68]

LEGAL ARGUMENT

IV.
APPLICATION OF QUALIFIED IMMUNITY TO § 1983 LAWSUITS

A public law enforcement officer is entitled to assert qualified immunity as to § 1983 claims alleging constitutional violations arising out of an interrogation of a criminal suspect as well as conspiracies to violate constitutional rights. Chavez v. Martinez 538 U.S. 760, 766, 773 (2003); Wyatt v. Cole 504 U.S. 158 (1992). The doctrine of qualified immunity presents significant substantive and procedural protections against § 1983 lawsuits.

In Pearson v. Callahan 129 S.Ct. 808 (2009) this Court recently enunciated the important policies underlying the application of qualified immunity to § 1983 claims:

> "The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly-established statutory constitutional rights of which a reasonable person would have known.' [citation omitted] ... The protection of qualified immunity applies regardless of whether the government officials' error is 'a mistake of law, a mistake of fact, or mistake based on mixed questions of law and fact.' [citation omitted]

> Because qualified immunity is an immunity from suit rather than a mere defense to liability ... it is effectively lost if a case is erroneously permitted to go to trial. [citation omitted] ... Accordingly, 'we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.' [citation omitted] Pearson, supra, 129 S.Ct. at p. 815.

While the legal significance of qualified immunity for public officials is unquestioned, the application of qualified immunity to private parties is far from settled.

V.
RICHARDSON V. MCKNIGHT

In Richardson v. McKnight (1997) 521 U.S. 399, supra, two prison guards who were employed by a private company which operated a Tennessee prison were sued by a prisoner under 42 U.S.C. § 1983 for allegedly injuring the prisoner through the use of extremely tight physical restraints. The private guards asserted a qualified immunity from § 1983 lawsuits. After the District Court and Sixth Circuit denied the guards' assertion of qualified immunity, this Court granted certiorari.

A. The Richardson Majority Opinion

In the Court's 5-4 decision, the majority opinion in Richardson determined that under the narrow facts and circumstances involving a private company managing a prison, the private prison guards were not entitled to assert qualified immunity from suit under § 1983. Richardson, supra at pp. 401, 413. In reaching this conclusion, the Richardson majority analyzed the Court's decision in Wyatt v. Cole 504 U.S. 158 (1992) which held that a private individual accused of conspiring with government employees was not entitled to assert qualified immunity on the "narrow" circumstance where the private individual was "invoking the state replevin, garnishment or attachment statute." Wyatt, supra at pp. 168-169; Richardson, supra at p. 404. In analyzing the Wyatt decision, the Richardson majority determined that there were two factors which must be analyzed in order to determine whether qualified immunity applied to the private prison guards in the § 1983 action before it: any history of providing immunity to prison guards and the policy concerns or purposes underlying immunity which would warrant applying it to the prison guards in the § 1983 action before it.

The Richardson majority concluded that history did not reveal a "firmly-rooted" tradition of immunity applicable to privately employed prison guards. Richardson, supra at p. 404. The majority determined that private contractors were heavily involved in prison management activities as far back as the 19th century and there was no conclusive evidence of a historical tradition of immunity for

private parties carrying out these functions. Richardson, supra at pp. 405-407. History, therefore, did not provide any significant support for the immunity claim of the private prison guards. Richardson, supra at 407.

The majority in Richardson determined that it was a closer question as to whether the purposes underlying qualified immunity warranted its application to the prison guards. Richardson, supra at pp. 407-408. The Court recognized that one of the primary purposes of the immunity doctrine is to protect public officials, as well as society, from unwarranted timidity by public officials who may be deterred from exercising their authority through the threat of lawsuits. Richardson, supra at pp. 407-408. The majority opinion rejected the prison guards' argument that since they perform the same work as state prison guards, qualified immunity must be applied to a similar degree. The majority held that the mere performance of a government function should not make the difference between unlimited § 1983 liability and qualified immunity especially for a private person who performs a job without government supervision or direction. Richardson, supra at p. 409. The majority also noted that marketplace pressures were different for a private company versus a government employer and thus there was less concern with unwarranted timidity. Richardson, supra at p. 409-410. The majority indicated that private employees may not be deterred by the threat of damages due in part to the availability of the comprehensive insurance requirements for private companies as well as the ability to offer higher pay or extra benefits

unavailable to civil service employers. Richardson, supra at p. 412-413. Finally, the majority noted that the risk of distraction from lawsuits alone is not a sufficient ground for immunity. Richardson, supra at p. 412.

The majority concluded that private prison guards, unlike those who work directly for the government, do not enjoy immunity from suit in a § 1983 case. Richardson, supra at p. 412.

B. The Richardson Majority Caveats

The majority opinion in Richardson carefully set forth three caveats to their holding that qualified immunity did not apply to the private prison guards for § 1983 liability under the particular circumstances of the case. First, the Court was not deciding whether the defendants were liable under § 1983 or whether they acted under color of state law. Richardson, supra at. p. 413. The second caveat, which has significant applicability to Dr. Blum's case, was stated by the majority as follows:

> "Second, we have answered the immunity question narrowly, in the context in which it arose. That context is one in which a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, undertakes that task for profit and potentially in competition with other firms. The case does not involve a

> private individual briefly associated with a governmental body, serving as an adjunct to government in an essential governmental activity, or acting under close official supervision." Richardson, supra at p. 413.

The third caveat set forth by the majority was the potential applicability of a "good faith" defense which the Richardson majority declined to decide in that case. Richardson, supra at p. 413.

C. The Richardson Dissent

Four Justices dissented from the majority opinion in Richardson. The dissent authored by Justice Scalia and joined by Chief Justice Rehnquist, Justice Kennedy, and Justice Thomas, argued that a functional approach should be applied to determine whether qualified immunity should be extended to private individuals. Richardson, supra at pp. 414-416. The dissent contended that the historical underpinnings underlying immunity established that private parties who were performing governmental functions which give rise to qualified immunity should also be entitled to assert qualified immunity. Richardson, supra at pp. 414-416.

The dissent questioned the holding that qualified immunity should be "unavailable to employees of private prison management firms, who perform the same duties as state-employed correctional officials, who exercise the most palpable form of state police power, and who may be sued for acting 'under color of state law.'" Richardson, supra

at p. 414. The dissent argued that the majority's historical approach was flawed and that the lack of case law supporting qualified immunity for private prison employees should not be disqualifying. Richardson, supra at pp. 414-416. Instead, the dissent relied upon prior Supreme Court precedent which held that immunity analysis rests on functional categories, not on the status of the defendant. Richardson, supra at p. 416-417. The dissent recognized that private individuals have regularly been accorded immunity when they perform a governmental function that qualifies. Richardson, supra at pp. 417-418.

The dissent suggested that the history of the functional approach should govern whether qualified immunity is extended to a private individual and that it should not be dependent upon policy reasons. Richardson, supra at p. 418. The dissent nonetheless analyzed the majority's policy reasons and concluded that the market pressures and insurance analysis employed by the majority was incorrect. Richardson, supra at pp. 419-420.

The dissent concluded that:

> "[S]ince there is no apparent reason, neither in history nor in policy, for making immunity hinge upon the court's distinction between public and private guards, the precise nature of that distinction must also remain obscure. ...
>
> Today's decision says that two sets of prison guards who are indistinguishable

> in the ultimate source of their authority over prisoners, indistinguishable in the powers that they possess over prisoners, and indistinguishable in the duties that they owed toward prisoners, are to be treated quite differently in the matter of their financial liability. .... Neither our precedent, nor the historical foundations of section 1983, nor the policies underlying section 1983, support this result." Richardson, supra at pp. 422-423.

VI.
CIRCUIT COURTS' DENIAL OF QUALIFIED IMMUNITY AFTER RICHARDSON

Since Richardson was decided nearly every Circuit Court which has considered whether qualified immunity is available to a private individual in a § 1983 action has denied the private party's assertion of qualified immunity.

The Sixth Circuit in Harrison v. Ash Co. 539 F.3d 510, 521-525 (6th Cir. 2008) applied the analysis employed in Richardson to hold that nurses who worked for a private company that provided medical services to a county jail were not entitled to assert qualified immunity on a § 1983 claim for failure to provide medical care to prisoner. In Cooper v. Parrish 203 F.3d 937 (6th Cir. 2000) the Sixth Circuit also held that a private attorney who worked alongside prosecutors in an unofficial capacity in pursuing legal action against plaintiff's nightclubs was not entitled to qualified immunity under

Richardson for plaintiff's § 1983 claims.

The Eleventh Circuit has also held that under Richardson, a private prison physician could not claim qualified immunity for failing to provide prompt medical treatment to a prisoner. Hinson v. Edmond 192 F.3d 1342 (11th Cir. 1999). In Rosewood Services v. Sunflower Diversified Services 413 F.3d 1163 (10th Cir. 2005), the Tenth Circuit held that a private non-profit corporation which received and distributed state and federal funds to community services providers to assist developmentally-disabled residents was not entitled to assert qualified immunity pursuant to Richardson.[3]

A Republican Party Chairman was held not to be entitled to qualified immunity for conspiring with state officials to unlawfully prevent a builder from constructing a single-family home on property he owned pursuant to the Second Circuit ruling in Toussie v. David Park Estates, Inc. 323 F.3d 178 (2nd Cir. 2003). In Malinowski v. DeLuca 177 F.3d 623 (7th Cir. 1999), the Seventh Circuit held that qualified immunity was not available under Richardson to private building inspectors on § 1983 claims.[4]

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[3] Prior to Richardson, the Tenth Circuit had held that private individuals who performed strip search of plaintiff at request of police were entitled to qualified immunity on plaintiff's §1983 claims). See Warner v. Grand County 57 F.3d 962 (10th Cir. 1995).

[4] In Sain v. Wood 512 F.3d 886, 892, the Seventh Circuit recognized that prior to Richardson, it had granted qualified immunity to privately employed prison psychologists because they were performing a government function, Williams v. O'Leary 55 F.3d 320, 324 (7th Cir. 1995); Sherman v. Four County Counseling Ctr. 987 F.2d 397, 405-406 (7th Cir. 1993) (footnote continued)

The only Circuit which appears to have extended qualified immunity to private individuals is the First Circuit. In Burke v. Town of Walpole 405 F.3d 66 (1st Cir. 2005) a private forensic odontologist who was acting as a consultant with the District Attorney's office in a criminal investigation was held to be entitled to qualified immunity. In Camilo-Robles v. Hoyos 151 F.3d 1 (1st Cir. 1998) the Court held private psychiatrist could assert qualified immunity who consulted with police department as to psychiatric status of police officer who injured plaintiff in § 1983 action. However, the First Circuit failed to even mention Richardson in arriving at their conclusion that qualified immunity was available to the private parties. see Sain, supra at p. 892.

The Ninth Circuit has been the most restrictive Court in applying qualified immunity to private parties, utilizing Richardson v. McKnight to establish a blanket prohibition against private actors asserting qualified immunity in its jurisdiction. Initially in Jensen v. Lane County 222 F.3d 570 (9th Cir. 2000) the Ninth Circuit addressed the Richardson majority's historical underpinnings and immunity policies factor in holding that qualified immunity was categorically unavailable to a private physician who, along with county officials, committed plaintiff to a psychiatric facility. However, since Jensen, the Ninth Circuit has extended a blanket prohibition against private individuals' claims of qualified immunity in § 1983 actions, holding that

---

but that Richardson majority rejected the public function test and therefore the law in the Circuit was inconclusive.

the defendant's status as a private party automatically disqualified him from qualified immunity status. Franklin v. Fox 312 F.3d 423, 440 (9th Cir. 2002) (blanket denial of qualified immunity to private individual accused of conspiring with police to violate defendant's Sixth Amendment rights when private individual interrogated or questioned plaintiff in jail without an attorney being present); Gonzales v. Spencer 336 F.3d 832, 835 (9th Cir. 2003) (private attorney hired to defend county in civil rights action denied qualified immunity by Ninth Circuit pursuant to Richardson because she was a private party and not a government employee); Clement v. City of Glendale 518 F.3d 1090, 1096-1097 (9th Cir. 2008) (holding that private towing company may not assert qualified immunity because the defense is generally not available to private defendants in § 1983 lawsuits).

Indeed, as recently as September 2010, the Ninth Circuit in Delia v. City of Rialto 2010 U.S.App. LEXIS 18836 (9th Cir. 2010) held that a private investigator retained by the City to assist in an internal affairs investigation against a firefighter was not entitled to qualified immunity simply because he was a private party. The Ninth Circuit's blanket prohibition against any private actor asserting qualified immunity in its jurisdiction explains the District Court's and the Ninth Circuit's failure to extend qualified immunity to Dr. Blum despite the fact he asserted his right to qualified immunity and briefed the issue before both Courts.

VII.
APPLICATION OF RICHARDSON TO DR. BLUM

A. Dr. Blum is Entitled to Assert Qualified Immunity Under the Richardson Caveat

The majority in Richardson carefully carved out an exception to the requirement that there must be a firmly-rooted tradition in history which supports immunity for a private party and that the purposes of immunity must be served before qualified immunity can be extended to a private party. The majority set forth a caveat that "a private individual briefly associated with a government body, serving as an adjunct to government in an essential governmental activity, or acting under close official supervision" should be entitled to assert qualified immunity. Richardson, supra at p. 431. However, the Circuit Courts have essentially ignored this caveat in post-Richardson decisions.[5] Therefore, because Dr. Blum's case involves unique facts which fall squarely under this caveat, this Court should clarify the application and scope of qualified immunity to private individuals under the "briefly associated/close supervision" caveat in Richardson.

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[5] The decision in Bartell v. Lohiser 215 F.3d 550, 556-557 (6th Cir. 2000) appears to be the sole exception. In Bartell, the Court determined that a private company which provided foster care services to the State was closely supervised by the State's Family and Dependents Agency and thus was entitled to assert qualified immunity under Richardson. Bartell, supra at pp. 556-557.

The record in this case unequivocally establishes that Dr. Blum's limited involvement in the Stephanie Crowe murder investigation is a perfect fit under the criteria set forth in Richardson's second caveat. First, Dr. Blum was briefly associated with the Escondido Police Department. In fact, his only association with the Escondido Police Department involved the Stephanie Crowe murder investigation. [App. 346] Moreover, although the police conducted numerous lengthy interrogations of the three criminal suspects, Dr. Blum only consulted with the police on a single interrogation involving Michael Crowe. [App. 332] Thus, Dr. Blum unequivocally was "a private individual briefly associated with a government body" under the Richardson caveat.

In addition, the record in this case also unequivocally establishes that Dr. Blum was "serving as an adjunct to government in an essential governmental activity." Richardson, supra at p. 413. Dr. Blum served as a consultant to the Escondido Police Department at the behest of Sergeant Anderson with respect to a single interrogation of Michael Crowe in conjunction with the Escondido Police Department's investigation of the brutal murder of 12-year-old Stephanie Crowe. The interrogation of criminal suspects in a murder investigation is undoubtedly an essential governmental activity. See Chavez, supra.

Finally, the record in this case indicates that Dr. Blum more than satisfies the "acting under close official supervision" criteria in the Richardson caveat. This caveat may have had more applicability if Dr. Blum had actually conducted the interrogation of Michael Crowe himself; however, he did not. [App. 214-215] Unlike most private defendants in § 1983 actions, Dr. Blum did not directly engage in any conduct which violated any constitutional right. As the District Court determined, Dr. Blum did not exercise control over the detectives during the interrogation or their murder investigation, nor engage in any conduct which shocked the conscience, findings which are undisturbed by the Ninth Circuit. [App. 284, 294] Therefore, Dr. Blum clearly meets the "under close official supervision" factor of the Richardson caveat.

As previously set forth, the Circuit Courts are virtually unanimous in denying qualified immunity to private individuals in § 1983 actions. The Circuit Courts generally fail to address the Richardson Court's second caveat by which this Court has indicated qualified immunity may be appropriately asserted by a private individual. Qualified immunity should be extended to Dr. Blum under the unique facts of this case which would result in this Court providing further guidance and clarification as to under what circumstances a private individual is entitled to assert qualified immunity under the Richardson majority Opinion.

B. The Richardson Majority Criteria for Extending Qualified Immunity to Private Individuals Should Be Re-Examined

As previously set forth, since the Richardson case was decided, the Circuit Courts have virtually unanimously rejected the application of qualified immunity to private parties in § 1983 lawsuits in analyzing the historical underpinnings and immunity purposes criteria established by the majority. Indeed, the Ninth Circuit has extended the Richardson Opinion as a virtual complete bar to private parties asserting qualified immunity in this jurisdiction.

In March of this year the Harvard Law Review published the scholarly treatise *Developments in the Law: State Action and the Public Private Distinction: Private Party Immunity from Section 1983 Suits*, 123 Harvard Law Review 1266 (March 2010). This treatise noted that:

> "Lower courts have attempted to apply [the Richardson majority] standard, but have been confused by Richardson's use of precedent and the complex mix of factors in its analysis and have reached divergent conclusions about various categories of private actors. It is time for the court to reconsider the Richardson standard and either clarify its own logic or adopt a new standard." 123 Harvard Law Review at p. 1267 ...

The court's narrow holdings in Wyatt and Richardson – the only two opinions to address private qualified immunity squarely – leave the applicability of the history and policy standard uncertain. The Richardson Opinion, upon which lower courts principally rely, fails to address complex issues of precedent and to clarify its own logic in applying the standard. Lower courts have unsurprisingly reached contradictory results in trying to apply Richardson. 123 Harvard Law Review at p. 1270. ....

Lower courts have varied widely in applying Richardson, with the majority of cases denying qualified immunity. Seven Circuits have used Richardson as a test, refusing to grant private actors' qualified immunity in any circumstances. While only one Circuit has explicitly granted private actors qualified immunity under Richardson, others have arguably done so implicitly, so immunity is not always categorically precluded. One Circuit has held that qualified immunity applied in every case it has considered, even though it has not relied on Wyatt or Richardson. The remaining four Circuits have no holding applying Richardson. Much litigation continues at the district court level without circuit-wide resolution." 123 Harvard Law Review at p. 1271.

The Harvard treatise concludes:

> "Contradictory immunity standards have costs. Patchwork liability across jurisdictions raises privatization costs as firms adapt to each jurisdiction's rules, requiring differences in benefits and personnel practices even within a state. Federal laws should not create such problems, especially since Congress is empowered to solve them. The inconsistency of outcomes in federal court make this litigation unfair to both defendants and plaintiffs, as constitutional liability and redress will depend not only on who the parties are, but also upon where they are. In addition, the deluge of more than 100 cases so far over whether qualified immunity applies is an added cost, not considered by Richardson, that has been and will continue to be passed on to society. The cost of litigation is sure to continue absent intervention.
>
> These problems could be largely addressed if the court clarified its immunity standard by explaining 'behest of the sovereign,' how the factors relate and which are dispositive, and who bears the burden of proof. Alternatively, the court could reform the standard by granting immunity to all state actors or to those who are

> determined to be based on certain state action tests (that is, a case-by-case functional standard). While the latter approach is less consistent than the former, it would reduce the inquiry to a single point and be no more inconsistent than the current standard. The court has had opportunities to review the issue, but it has not done so. ... Otherwise the aggregate costs of inconsistency will continue to rise, and state privatization will continue to be burdened needlessly. A clear, logically coherent standard is something upon which all states and their citizens can and should insist." 123 Harvard Law Review at pp. 1277-1278.

This recent treatise enunciates persuasive reasons why writ of certiorari should be granted in the present case to clarify and/or re-examine the standard under Richardson for granting qualified immunity to private individuals.

Finally, simple justice should cause this Court to grant Dr. Blum's writ of certiorari in the present case. By assisting the police in their investigation of Stephanie Crowe's murder, Dr. Blum has been found to be a state actor for purposes of § 1983 liability. [App. 213-214] Moreover, since the Ninth Circuit has determined that Dr. Blum could be liable on a conspiracy theory under the incredibly nebulous standard of "not categorically inconsistent with a meeting of the minds," Dr. Blum could conceivably be liable for the actions of the Escondido Police

Detectives.

Dr. Blum's extremely limited participation in the Stephanie Crowe murder investigation essentially consisted of consulting with the police on a single interrogation of Michael Crowe on January 23, 1998. The Escondido Police, on the other hand, according to the Ninth Circuit Opinion conducted four separate interrogations of Michael Crowe, two separate interrogations of Aaron Houser, and three separate interrogations of Joshua Treadway. The Escondido Police interrogated these three individuals for a total of nearly 45 hours. [App. 12-30] In addition, the police conducted numerous arrests and searches and seizures in which Dr. Blum had absolutely no part.

The Escondido Police who performed the many interrogations, the arrests, and the searches and seizures are entitled to assert qualified immunity in this case and could conceivably obtain a complete exoneration for their actions under the qualified immunity doctrine. To prohibit Dr. Blum, who had meager participation in the massive scope of the Stephanie Crowe murder investigation, from asserting qualified immunity simply because of his status as a private citizen is an extreme injustice. This is precisely the type of case where writ of certiorari should be granted so that this Court may re-examine and clarify the contours of the qualified immunity doctrine for private individuals and consider the stark ramifications in denying qualified immunity to private individuals who provide limited assistance to law enforcement officials in criminal investigations.

VIII.
PLAINTIFFS' FOURTEENTH AMENDMENT RIGHTS WERE NOT VIOLATED AND THE LAW WAS NOT CLEARLY ESTABLISHED THAT THE SUBJECT INTERROGATIONS VIOLATED THE FOURTEENTH AMENDMENT

In Pearson, supra, this Court clarified that in evaluating the two-prong test: (1) whether the facts alleged or shown by the plaintiff make out violation of a constitutional right and (2) if so, whether that right was clearly established at the time of defendant's alleged misconduct that it was not necessary that those prongs be evaluated in that exact sequence. Pearson, supra at pp. 815-816. In the instant case, regardless of the sequence in which the two-prong test is evaluated it is clear that Dr. Blum is entitled to summary judgment under a qualified immunity analysis.

The Ninth Circuit explained its reversal of the grant of summary judgment to Dr. Blum as to the conspiracy claim "insofar as these tactics and lines of questioning by the detectives shock the conscience, as demonstrated above, summary judgment in favor of Dr. Blum is unwarranted." [App. 67] However, in utilizing the two-pronged approach clarified by this Court in Pearson, supra, the evidence does not establish: 1) that the "tactics and lines of questioning" by the detectives during Plaintiffs' interrogations rose to the stringent shock the conscience level of conduct necessary to establish a

Fourteenth Amendment violation; [6] and 2) nor was the right to be free from the particular "tactics and lines of questioning" employed by the Escondido detectives clearly established.

A. Plaintiffs' Fourteenth Amendment Rights Were Not Violated

As this Court recognized in Chavez v. Martinez, supra, deprivations of liberty caused by "the most egregious official conduct" or behavior that "shocks the conscience" may violate the Fourteenth Amendment due process clause giving rise to a § 1983 claim. Chavez, supra at p. 774 (Opinion by Justice Thomas); County of Sacramento v. Lewis 523 U.S. 833 (1998).

With respect to interrogations which may violate the Fourteenth Amendment, Justice Kennedy characterized such conduct as the "use of torture or its equivalent in an attempt to induce a statement that violates an individual's fundamental right to liberty of the person. [citation omitted] The Constitution does not countenance the official imposition of severe pain or pressure for purposes of interrogation." Chavez, supra at p. 796, concurring

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[6] As previously set forth, Dr. Blum consulted with the Escondido Police Officers on the single January 23, 1998 interrogation of Michael Crowe and did not consult or participate in any manner in the interrogations of Aaron Houser or Joshua Treadway or any of the other interrogations of Michael Crowe conducted by the Escondido Police. Insofar as Houser is making claims based on either his or Michael Crowe's interrogation, the arguments in this Petition apply fully to Houser's claims.

and dissenting Opinion by Justice Kennedy). Also see footnote 1 in Justice Stevens' concurring and dissenting Opinion in Chavez, supra at p. 787, listing Supreme Court cases where "unusually coercive police interrogation procedures" violated the Fourteenth Amendment. (Darwin v. Connecticut, 391 U.S. 346 (1968) (suspect interrogated for 48 hours *incommunicado* while officers denied access to counsel); Beecher v. Alabama 389 U.S., 36 (1967) (officer fired rifle into suspect's ear and said if you don't tell the truth I'm going to kill you); Clewis v. Texas 386 U.S. 707 (1967) (suspect was arrested without probable cause, interrogated for nine days with little food or sleep, and gave three unwarranted "confessions" each of which he immediately retracted); Reck v. Pate 367 U.S. 433, 439 - 440 (1961) (mentally-retarded youth interrogated *incommunicado* for a week, during which time he was frequently ill, fainted several times, vomited blood on the floor of the police station, and was twice taken to the hospital on a stretcher).

It is undisputed that Dr. Blum did not engage in any conscience-shocking or egregious activity and did not interrogate any of the Plaintiffs in this matter. [App. 297] Moreover, with respect to Plaintiffs' conspiracy claim, the record in the instant case is devoid of the conscience-shocking, egregious conduct equivalent to torture which satisfies the demanding Fourteenth Amendment standards. The District Court, after exhaustively examining the videotapes of the interrogations, determined that the interrogations conducted by the Escondido Police did not rise to the conscience-shocking standard required for a Fourteenth Amendment violation. [App. 291-

298]

The record is devoid of any evidence that the police used any form of physical force or coercion, that the officers yelled at or even raised their voices during any of the interrogations, or deprived the boys of sustenance as this Court has required in previous cases to sustain a Fourteenth Amendment violation based upon the interrogation of a criminal suspect. (See District Court Opinion, App. 291-298.) Because the police officers' interrogation of Michael Crowe does not rise to the level of conscience-shocking and egregious conduct necessary to support a Fourteenth Amendment claim, qualified immunity would be applicable to the claims against Dr. Blum.

B. The Law Was Not Clearly Established That the "Tactics and Lines of Questioning" in the Interrogation Violated the Fourteenth Amendment

The second prong under Pearson, supra whether the right at issue is clearly established - is also satisfied for the purposes of applying qualified immunity to the interrogations. This inquiry turns on the "objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." Pearson, supra at p. 822. In the instant case it is impossible to argue that the law was clearly established that the "tactics and lines of questioning by the detectives" during Plaintiffs' interrogations violated the Fourteenth Amendment as the Ninth Circuit exclusively relied upon in determining that summary judgment in favor of Dr. Blum was unwarranted. [App. 67]

First, if the law were clearly established that the detectives' tactics and lines of questioning violated the Fourteenth Amendment, the District Court would have been required to find a Fourteenth Amendment violation. Instead, in contrast to the Ninth Circuit, the District Court reviewed all 40-plus hours of the interrogations as well as the transcripts of the interrogations and determined that the detectives' conduct, tactics and lines of questioning did not in fact violate the Fourteenth Amendment. [App. 291-297]

It is difficult to articulate that the law was clearly established that the detectives' tactics and lines of questioning violated the Fourteenth Amendment when a Federal Court District Judge who reviewed hours and hours of the interrogations held that such conduct did not violate the Fourteenth Amendment. As this Court has recognized, "If judges disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." Pearson, supra at p. 823.

Moreover, the law regarding what constitutes a Fourteenth Amendment violation in a custodial interrogation was far from settled under Ninth Circuit law. The Ninth Circuit's decision in Stoot v. City of Everett 582 F.3d 910 (9th Cir. 2009) exemplifies the unsettled nature of conduct that violates the Fourteenth Amendment in custodial interrogations of minors. In Stoot, a developmentally delayed 14-year-old was interrogated by a police detective regarding claims that he had sexually abused a 3-year-old girl. The interrogation of the 14-year-old involved much of the same tactics/lines of

questioning that the Ninth Circuit in the present case concluded shocked the conscience.

The detective in Stoot threatened the 14-year-old with heightened punishment if the minor denied his guilt and promised leniency if he admitted guilt. Stoot, supra at p. 915. The minor testified that the detective would not take no for an answer and that the minor did not know what to do besides tell the detective that he committed the crime as he believed that was the only way he was going to walk out of the room. Stoot, supra at p. 915. The detective threatened the minor with jail if he kept denying the crime but that if he confessed to the crime it would be all over and there would be no jail. Stoot, supra at p. 915. The mentally-disabled minor in Stoot was overcome by the tactics of the physically-imposing detective and stated he had never been so scared in his life, that he wanted his mom or dad or a teacher, and because the detective kept drilling him that he felt he had to lie and tell the detective what he wanted in order for the interrogation to stop. Stoot, supra at p. 916. The juvenile court found that the statements made by the minor in his interrogation were the product of impermissible coercion and ruled them inadmissible. Stoot, supra at p. 917.

The minor thereafter brought federal constitutional claims under § 1983 against the detective, alleging among other things violation of his substantive due process rights under the Fourteenth Amendment. The detective asserted qualified immunity. As to the Fourteenth Amendment claims, the Ninth Circuit held as follows:

"Jensen's interrogation techniques, even when construed to the light most favorable to the Stoots, did not rise to the level of a Fourteenth Amendment violation. The Stoots allege that Jensen used 'improper promises and threats ... [that] clearly overcame whatever will the child could have in denying these allegations.' They claim that because Paul was a 'developmentally-delayed young boy, he could not fully and accurately comprehend that these promises were reasonable or make an accurate assessment of the potential outcomes in the same manner as an adult.' And they correctly note that under this Court's precedent, psychological coercion is sufficient to state a claim under the Fourteenth Amendment. [citation omitted]

While these allegations might be relevant to the question whether Paul's confession was in fact voluntary and therefore admissible, an issue the juvenile court resolved in Paul's favor, they fall below what is required to state a claim under the Fourteenth Amendment. Notably lacking, for example, is any allegation that Jensen 'intended to injure [Paul] in some way unjustifiable by any government interest,' as required by precedent. [citation omitted] Stoot, supra at pp.

928-929.

It is difficult to argue that the law was clearly established that the Escondido detectives' questioning of Plaintiffs violated their Fourteenth Amendment rights when they utilized similar tactics to those set forth in Stoot which the Ninth Circuit held did not establish a Fourteenth Amendment violation. The Stoot decision is conclusive that the alleged conduct of the Escondido Police Department whom Dr. Blum allegedly conspired with did not violate clearly-established law with respect to the interrogations of Plaintiffs.

Finally, this Court's own decision in Chavez, indicates that the law was not clearly established that the tactics and lines of questioning utilized by the police detectives in Michael Crowe's interrogation violated the Fourteenth Amendment. In Chavez, the criminal suspect "had been shot in the face, both eyes were injured; he was screaming in pain, and coming in and out of consciousness while being repeatedly questioned about the details of the encounter with police." [citation omitted] His blinding facial wounds made it impossible for him visually to distinguish the interrogating officer from the attending medical personnel. The officer made no effort to dispel the perception that medical treatment was being withheld until Martinez answered the questions put to him. There was no attempt through Miranda warnings or other assurances to advise the suspect that his cooperation should be voluntary. Martinez begged the officer to desist and provide treatment for his wounds, but the questioning persisted despite these pleas and despite Martinez's unequivocal

refusal to answer questions. Chavez, supra at p. 798 (concurring and dissenting Opinion of Justice Kennedy).

Under these facts, three Justices determined that the interrogation shocked the conscience and plaintiff's Fourteenth Amendment rights were violated. Chavez, supra at p. 789, 798-799 (Opinion by Justice Kennedy joined by Justice Stevens and Justice Ginsberg). Two Justices, on these very same facts, determined that the conduct of the officers during their interrogation was not "egregious" or "conscience-shocking" to constitute a violation of the Fourteenth Amendment. Chavez, supra at pp. 774-776 (Opinion by Justice Thomas); Chavez, supra at p. 783 (Opinion by Justice Scalia).

As the district court in this case determined, the interrogation in Chavez was far more egregious than the Escondido detectives' interrogations in the present case [App. 294-296] and therefore, a reasonable officer would not have known that the interrogations of the boys would have amounted to a violation of their Fourteenth Amendment rights to substantive due process given the interrogations lacked the brutality has previously marked the police conduct found by the Courts to be "shocking to the conscience." [App. 294-296]

The law was not clearly established that the tactics and lines of questioning utilized in Plaintiffs' interrogations shocked the conscience or were so egregious as to constitute a violation of the Fourteenth Amendment. If allowed to assert qualified immunity, Dr. Blum would therefore be entitled to summary judgment in his favor based upon the remaining conspiracy claim against him.

IX.
CONCLUSION

Because there are serious constitutional questions raised by Dr. Blum's case regarding the application of qualified immunity to private citizens, the Court should grant Dr. Blum's Petition for Writ of Certiorari.

Dated: September 16, 2010

Respectfully submitted,

MURCHISON & CUMMING, LLP

By: _____

Dan L. Longo, Esq.
Attorneys for Petitioner
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CERTIFICATE OF COMPLIANCE

No. _____

LAWRENCE N. BLUM, PH.D., *Petitioner*

v.

MICHAEL CROWE, STEPHEN CROWE, CHERYL A. CROWE, JUDITH ANN KENNEDY, SHANNON CROWE, AARON HOUSER, MARGARET SUSAN HOUSER, CHRISTINE HUFF, AND GREGG HOUSER, *Respondents*

As required by Supreme Court Rule 33.1(h), I certify that the Petition for a Writ of Certiorari contains 8,838 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct. Executed this 16th day of September, 2010.

Dan L. Longo, Esq.

CERTIFICATE OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Diego, State of California. My business address is 750 "B" Street, Suite 2550, San Diego, California 92101-8114.

On September 16, 2010, I served true copies of the following document(s) described as **PETITION FOR WRIT OF CERTIORARI** on the interested parties in this action as follows:

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(original and 40 copies)

(and 3 copies to each of the following):

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BY MAIL: I enclosed the document(s) in sealed envelopes or packages addressed to the persons/entities at the above addresses and placed the envelopes for collection and mailing, following our ordinary business practices. I am readily familiar with Murchison & Cumming's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct. Executed on September 16, 2010, at San Diego, California.

_____
Diane E. Christel

(3) (3) (2)

Nos. 10-376, 10-377, 10-420

Supreme Court, U.S.
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In The
Supreme Court of the United States

MARK WRISLEY, *et al.*,

Petitioners,

v.

MICHAEL CROWE, *et al.*,

Respondents.

CHRISTOPHER McDONOUGH,

Petitioner,

v.

MICHAEL CROWE, *et al.*,

Respondents.

LAWRENCE N. BLUM,

Petitioner,

v.

MICHAEL CROWE, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

Whether Petitioners have presented compelling reasons to grant the petitions, where the Ninth Circuit Court of Appeals correctly held on the record before it that:

1. Use of confessions coerced from juveniles and later introduced in pre-trial proceedings during the course of the "criminal case" violate the Fifth Amendment right against self-incrimination;

2. A police conspiracy to intentionally violate a juvenile's Constitutional rights, with the aim of coercing a confession no matter the human toll, sufficiently "shocks the conscience" to support a violation of the Fourteenth Amendment's due process protections;

3. A clinical psychologist, retained by police to devise strategies and techniques to "psychologically break" juvenile criminal suspects during coercive interrogations, may be held liable for conspiracy to violate those juveniles' constitutional rights.

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I. INTRODUCTION

There is a climactic scene in the beloved movie classic, *The Wizard of Oz*, where Dorothy and her cohorts return to the Emerald City for an audience with a powerful Wizard who has promised to deliver Dorothy to Kansas, a brain to the Scarecrow, a heart to the Tin Woodsman, and bravery to the Cowardly Lion. When they finally come face to face with the Mighty Oz, the apparition blusters, telling them not to invoke his wrath and to go away. Just then however, Dorothy's dog Toto pulls aside a curtain, revealing nothing more than a slight man operating levers that have only created the illusion of the Wizard. In that unguarded moment, the Mighty Oz admonishes them to "pay no attention to the man behind the curtain," but is ultimately forced to admit that he is little more than a balloonist from Kansas.

Like the Mighty Oz, Petitioners have attempted in their respective petitions to mystify this Court with the look and feel of great erudition, while concealing the humble reality that those petitions present nothing that has not already been decided by this Court and uniformly followed by the Circuit Courts of Appeal. Petitioners also urge this Court to pay no attention to what lies behind their curtain of rhetoric and hyperbole, but Respondents pull it back here to: (A) clarify that no conflict exists among the Circuit Courts which have actually decided the issue confronted by the Ninth Circuit here – the use of coerced confessions in pre-trial proceedings within the "criminal case" after charges have been filed;

(B) illuminate how psychological torture, leveled against 14- and 15-year-old boys, has long been regarded as the basis for a Fourteenth Amendment due process violation; and (C) explain how uniform authority holds that private actors who assist in violating the constitutional rights of others may be held liable for conspiracy. In doing so, Respondents remind this Court of its own relevant decisions and the consistent decisions of the Circuit Courts, all of which demonstrate why review is not warranted here. Accordingly, Respondents urge this Court to deny review in this case where, like that balloonist from Kansas, Petitioners' respective petitions are viewed by this Court for what they really are, and not what Petitioners have projected them to be.

II. STATEMENT OF THE CASE

For well over a half century – and in two seminal decisions, *Haley v. State of Ohio*, 332 U.S. 596 (1948) and *In re: Gault*, 387 U.S. 1 (1967) – this Court has recognized that juveniles subjected to the strain of custodial police interrogations are "easy victims of the law" and as such, "cannot be judged by the more exacting standards of maturity." It has done so reasoning "that which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens." And it is for that very reason that this Court recognized why "authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children."

Consequently, this Court has mandated that the police must exercise "the greatest care" in their interrogations of juveniles – not only to assure that any admissions are not coerced – but also to guarantee that they are "not the product of ignorance of rights, or of adolescent fantasy, fright or despair." Similarly, it has instructed reviewing courts to take "special care" in scrutinizing the record where a juvenile's confession is at issue, especially where the totality of circumstances suggest that the minor is "no match for the police in such a contest."

This case poignantly illustrates the reasons for the Court's concern. Indeed, this case is the tragic tale of the police investigation of the murder of 11-year-old Stephanie Crowe, who was viciously stabbed to death in her bedroom by Richard Tuite, a schizophrenic transient with a history of drug use and violent crime. Within a few short hours leading up to that murder, Tuite had been menacing an otherwise quiet neighborhood in rural Escondido, California, in his search for "Tracy," an old girlfriend. His activities understandably prompted several 911 calls to local police officials from anxious neighbors complaining about Tuite's bizarre behavior and attempts to enter their homes looking for "Tracy."

When those police officials finally responded in the late evening hours, they knew Tuite was last seen banging on the door of a home adjacent to where Stephanie Crowe lived. Approaching that location with all lights on his patrol car ablaze, the lone police officer sent to the scene saw a side door to Stephanie's

house inexplicably close as he approached. But without investigating further, that officer turned around, concluded that Tuite was simply "gone on arrival," and then took himself out of service so he could eat dinner.

Having so easily evaded that police officer, Tuite made his way through Stephanie's house and into her bedroom, finally finding someone he believed resembled "Tracy." Tuite then fatally stabbed Stephanie in her bedroom, where she was found slain by her horrified family.

Called to investigate in the morning, the police instantly seized upon a flawed theory that this hideous crime had been committed by a member of Stephanie's family, and not by Tuite. Using a ploy to separate Stephanie's brother and sister from their parents, the police instantly began hammering on Stephanie's 14-year-old brother, Michael Crowe, as their lead suspect. In brazen violation of Michael's rights, the police subjected Michael to prolonged, coerced interrogations, deliberately disregarding his repeated requests to see his parents, to stop the interrogations, and to use the bathroom or to sleep. Enlisting the aid of a clinical psychologist and a "truth box" voice analyzing machine which they knew was merely a sham instrument meant to intimidate and "psychologically break" Michael, the police ultimately wore Michael down, convincing him that he had some sort of pent-up hate of Stephanie that caused him to "black out" and kill her without realizing it.

Yet even after coercing that confession, the police still had a problem. While the evidence continued to point strongly to Tuite as Stephanie's murderer, no physical evidence linked Michael to the crime. Ignoring Tuite, the police cast a dragnet over two of Michael's friends, Joshua Treadway and Aaron Houser (also juveniles), accusing them of being accomplices and co-conspirators. In what one expert would later characterize as "the most extreme form of emotional child abuse that I have ever observed in my nearly 40 years of observing and working with children and adolescents," the police employed the same coercive interrogation techniques to Joshua and Aaron, not to learn or discover the truth, but to browbeat, deceive, threaten and – by any means necessary – coerce them into admitting to their preconceived and factually unsupported theory of how Stephanie was murdered, no matter how strongly the actual evidence pointed toward Tuite.

However, when blood evidence from Tuite's clothing (ignored by the police for a year) was later confirmed to be Stephanie's, charges against Michael, Joshua and Aaron were reluctantly dropped, and Tuite was prosecuted for, and ultimately convicted of, Stephanie's murder. Consequently, Michael, Joshua and Aaron filed suit against the police and related entities, alleging that their civil rights had been repeatedly and intentionally violated by the police to support a ridiculous "theory-based" investigation, and in a concerted effort to provide "cover" for one of their

own who had the last, best chance to stop Tuite, but never even attempted to do so.

While the District Court granted the police summary judgment by measuring their behavior as if they had been dealing with hardened adult criminal suspects, the Ninth Circuit reversed, finding on *de novo* review that "[o]ne need only read the transcripts of the boys' interrogations, or watch the videotapes, to understand how thoroughly the defendants' conduct in this case 'shocks the conscience.'" (App. 47.)[1] The Ninth Circuit further held that use of those coerced confessions at various pre-trial hearings – but after charges had been brought against the boys and the "criminal case" commenced – violated their Fifth Amendment right against self-incrimination. (App. 36-45.)

In an attempt to induce this Court's review, Petitioners have offered a highly glossed and sanitized version of the underlying facts. *But it is the unique and compelling facts of this case which make it a particularly unsuitable vehicle for review on the multiple issues raised by Petitioners.* Thus, as Rule 15.2 requires Respondents to point out to the Court any perceived misstatements of fact contained in the underlying petitions, Respondents focus here on the

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[1] All factual references in this Opposition Brief are made to the Appendix of documents attached to the Petition of Mark Wrisley, Barry Sweeney, Ralph Claytor, and Phillip Anderson ("the Escondido Petitioners"), and are abbreviated as: "(App. [page].)"

insufficiencies in that recitation, citing to the underlying opinions of the Ninth Circuit and the District Court.

A. Summary.

In his separate Opposition Brief, Co-Respondent, Michael Crowe, describes in detail the facts leading up to Tuite's murder of Stephanie, how the circumstantial and physical evidence strongly implicated Tuite from the outset of the investigation, and how no physical evidence whatsoever tied Michael to the murder of his sister. Thus, for the sake of brevity, a full recounting of those facts and circumstances will not be repeated here.

Suffice it to say, however, that within minutes of arriving at the scene, the Escondido police officers investigating Stephanie's murder conspired to pin that hideous crime on a family member, and Michael unfortunately became their target. The problem with that plan was that notwithstanding their ability to "psychologically break" Michael and to coerce a confession from him, *the police could find no physical evidence (including a murder weapon) linking Michael to that crime*. Thus, to justify their own mistreatment of Michael, the investigating officers further conspired to search, arrest and interrogate two of Michael's friends, Joshua Treadway and Aaron Houser, all with the goal of further knuckling under those juveniles to support their "theory-based"

investigation, even as the objective evidence increasingly pointed to Tuite.

B. January 22, 1998: The Police Interrogate Aaron Houser at His Home.

On January 22, 1998, Petitioners first interrogated Aaron at his residence. (App. 25.) They initially questioned Aaron regarding his relationship with Michael, and his interest in mystical fantasy games and medieval weapons. (*Id.*) Although those questions were clearly intended to elicit incriminating responses from Aaron, the police never warned Aaron (then a 14-year-old with no prior criminal record) of his *Miranda* rights. (*Id.*)

C. January 27, 1998: The Police Interrogate Aaron Houser Again at His Home and at the Escondido Police Department.

On January 27, 1998, Petitioners executed a search warrant at Aaron's residence, based primarily on prior statements they elicited from him. (App. 25.) During that search, Aaron was confined to his living room and kitchen, except when brought to his bedroom to answer questions. Aaron was then taken to the Escondido police station for further questioning, which lasted nearly two hours. (*Id.*) Again, those interrogations were clearly intended to elicit incriminating responses and were even videotaped for that

purpose, but at no time was Aaron advised of his Fifth Amendment rights. (*Id.*)

D. January 27, 1998 to January 28, 1998: The Police Interrogate Joshua Treadway For 13 Hours Overnight.

At approximately 7:00 p.m. on January 27, 1998, the Escondido Police began their first grueling interrogation of Joshua, lasting over 13 hours. (App. 29-30.) To begin, Claytor questioned Joshua for several hours, employing various techniques outlined for him by psychologist, Lawrence Blum, meant to coerce Joshua into admitting involvement in a crime that neither he, nor his friends, committed. (*Id.*) Specifically, Claytor baited Joshua with promises of leniency (rehabilitation) and then scared him with threats of punishment (prison). (*Id.*) He also denied Joshua's request to see his mother, denied his request for water, and refused to take him to the bathroom. (*Id.*) Claytor never advised Joshua of his Fifth Amendment rights. (*Id.*)

As Joshua began to show visible signs of strain following Claytor's, Wrisley's and Sweeney's seven hours of grilling, McDonough strategically took over Joshua's interrogation at 3:00 a.m. on January 28, 1998, consistent with the plan the officers and Blum had previously devised to "break" Joshua. (*Id.*) It was at this time that McDonough turned loose on Joshua the "truth box" Computer Voice Stress Analyzer ("CVSA") device. (*Id.*) Notably, McDonough would

later admit he did not know how or if the CVSA worked, but told Joshua in no uncertain terms that the CVSA was "97% accurate," and immediately determines if your answer is right or wrong.

Despite McDonough's onslaught and deception, Joshua initially maintained his innocence. (App. 30.) However, McDonough relentlessly interrogated and psychologically abused Joshua, utilizing the CVSA as the tool of that coercion. Joshua was exhausted and repeatedly asked to be allowed to sleep. (*Id.*) When Joshua ultimately broke down and falsely told McDonough that Aaron gave him the knife used to kill Stephanie – *the only story Joshua discerned would allow him to escape further coercion* – McDonough pretended to administer another CVSA exam, telling Joshua that he had now "passed" the test. (*Id.*) Yet at no time during over 13 hours of interrogation did McDonough "*Mirandize*" Joshua Treadway. (*Id.*)

E. The Ruse Phone Call to Aaron.

Having "cracked" 15-year-old Joshua, Claytor and Anderson further manipulated Joshua in an unconscionable attempt to obtain a false confession from Aaron. Specifically, they goaded Joshua to call Aaron and to accuse him of complicity in Stephanie's murder while they secretly listened to that phone call. (App. 30.) Aaron, however, denied any involvement, and was emotionally shocked, confused and frightened by that ruse. (*Id.*)

F. February 10, 1998: The Police Interrogate Joshua For Another 12 Hours.

Having already succeeded in extracting a false story from Joshua that Aaron gave him the knife Michael used to kill Stephanie, McDonough, Claytor and other officers pushed their plan further, deciding to bring Joshua back for another interrogation on February 10, 1998. (App. 30.)

Knowing that Joshua was already vulnerable to their influence and that they could now manipulate Joshua to follow their preconceived script, McDonough and Claytor interrogated Joshua for another 12 hours. (*Id.*) With direction and assistance from Blum, Claytor and McDonough used similar coercive techniques to those utilized on January 28, 1998, with similar results. By the end of that interrogation session, they had Joshua fabricate a fantasy confession in which Aaron stabbed Stephanie with Michael Crowe's help, while he (Joshua) acted as the "lookout." (*Id.*)

Notably, that false confession was so meandering and internally inconsistent – with key facts changing every few moments – that even McDonough doubted it to be true. (*Id.*) Yet this did not deter the officers from arresting Joshua at the conclusion of this second interrogation, *reading him his Miranda rights for the first time*, and booking him into San Diego County Juvenile Hall. (*Id.*)

G. February 11, 1998: The Police Arrest Aaron at School, Search His Locker and Home, and Interrogate Him For a Third Time.

Using Joshua's false confession of February 10, 1998, as "probable cause," the following day the police searched Aaron's home and his school locker, while they seized Aaron at his school without telling him he was under arrest. (App. 25.)

After Aaron was brought from school to the Escondido Police Department, he was interrogated for a total of nine and one-half hours, primarily by McDonough. (*Id.*) As with Michael and Joshua, McDonough's interrogation of Aaron was psychologically grueling, was based on coercive techniques and strategies tailored by Blum to overtake Aaron's will and to force a false confession, and was justified by Blum telling the officers that Aaron was "a Charles Manson wannabe" and "Charles Manson with an I.Q." (App. 26, 77.) Aaron was also interrogated under false pretenses in that neither he nor his parents were told that Joshua had implicated him in the murder, or that Aaron was even a suspect. (App. 26-28.) As such, Aaron was under the false impression that he was merely assisting the police in their investigation of Michael. (*Id.*)

As with Joshua, McDonough repeatedly deceived Aaron in his attempts to extract a confession. For example, during the interrogation, McDonough asked Aaron to describe "hypothetically" how Michael might

kill Stephanie, how Joshua might, and how Aaron might do so. (*Id.*) To accomplish that goal, McDonough used the CVSA device to "condition" and "suggest" Aaron's responses. (*Id.*) But not only was Aaron's hypothetical description at odds with the evidence of how the killing actually took place, it was completely different from Joshua's fabricated scenario, which also did not match the evidence. Nevertheless, McDonough told Aaron that the CVSA indicated that he was "definitely involved" and that Petitioners had physical evidence against him and would soon uncover more. (*Id.*) McDonough continued that deception by also telling Aaron that Michael and Joshua had said that Aaron helped him kill Stephanie, and that the physical evidence would implicate him. (*Id.*)

Upon realizing for the first time that he had been deceived and was being questioned as a suspect, Aaron demanded that the interrogation stop and asked to use the bathroom. Neither request was honored. (*Id.*) On two additional occasions, Aaron asked to speak with his mother, but was not permitted to do so.[2] (*Id.*) Claytor also denied Aaron the right to speak with his father. (*Id.*) On another occasion, Aaron demanded that the interrogation cease which

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[2] Under California law, a minor subject to custodial interrogation invokes his Fifth Amendment right by asking to see a parent. *People v. Burton*, 6 Cal.3d 375, 383-384 (1971). Upon such a request, before or during questioning, "the police must cease custodial interrogation immediately." *Id.* at 384.

request was likewise denied. (*Id.*) Yet after approximately 11 hours of coercive interrogation in which Aaron maintained his innocence, the police booked him into Juvenile Hall, never having properly advised him of his *Miranda* rights. He was thereafter handcuffed, photographed in the nude, and incarcerated for approximately *eight months*.

H. Use of the Boys' Statements in the Criminal Cases Against Them.

Statements obtained from the boys during their interrogations were introduced during at least three pre-trial proceedings. (App. 30-31.) First, a "*Dennis H.*" hearing was held and resulted in Aaron and Joshua spending several months in jail awaiting trial.[3] Second, the boys' statements were introduced during subsequent grand jury proceedings, resulting in indictments against all three boys for murder. Finally, the statements were used in a "707 Hearing" to determine if the boys would be tried as juveniles or adults.[4] (*Id.*)

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[3] In California, when a minor is taken into custody by a police officer, he must be released within 48 hours from the time of apprehension unless a petition is filed within that time in a court of competent jurisdiction explaining why the minor should be declared a ward of the court. See Cal. Welf. & Inst. Code § 631; see also *In re: Dennis H.*, 19 Cal.App.3d 350, 354 (1971).

[4] The California Supreme Court has characterized trying a minor as an adult as "the worst punishment the juvenile system is empowered to inflict." *Ramona R. v. Superior Court*, 37 Cal.3d

(Continued on following page)

Notably, at a subsequent suppression hearing, the state court found that most of Michael's statements were the product of a "coercive scheme" by the police and suppressed them. Similarly, the state court suppressed all of Aaron's statements on the grounds that Aaron had never been *Mirandized*, while also suppressing a large portion of Joshua's statements on the same basis. (App. 31-32.)

I. Dismissals of Indictments and Prosecution of Tuite.

After the case against the boys had been set for trial, pieces of Tuite's clothes (which had been collected but never analyzed when the police first stopped Tuite the day after Stephanie was killed) were examined, the DNA results of which revealed spots of Stephanie's blood. (App. 32-33.) The prosecution then filed a Motion to Dismiss the indictment against the boys. (*Id.*)

J. The Boys' Subsequent § 1983 Action in the District Court.

After the charges against them were dismissed, the boys and their families filed three separate complaints in state court alleging violations of 42 U.S.C.

802, 810 (1985); accord *Marcus W. v. Superior Court*, 98 Cal.App.4th 36, 45 (2002) (holding that the privilege against self-incrimination applies in "707 hearings").

§ 1983 and various state law torts. Petitioners removed the complaints to federal court. (App. 33-36.)

Following various motions to dismiss those complaints, the District Court consolidated all three actions and ordered the filing of a Joint First Amended Complaint. (*Id.*) Petitioners then brought over 10 separate motions for summary judgment, which were the subject of substantial, serial briefing in the District Court over a period of four and one-half years. (*Id.*) Prior to Tuite's trial and ultimate conviction for Stephanie's murder, the District Court issued the first of two lengthy opinions on February 17, 2004, finding in substance that Joshua's and Aaron's respective claims for violation of their Fourth, Fifth and Fourteenth Amendment rights did not survive summary judgment. (App. 197-356.)

After Tuite's conviction, the District Court on February 28, 2005 ruled on Michael's and his family's remaining civil rights claims, prompted by a second round of similar motions for summary judgment filed by Petitioners. Following the course it charted with the claims brought by Joshua and Aaron, the District Court also denied Michael any relief on his Fourth, Fifth, and Fourteenth Amendment claims. (App. 90-196.)

K. The Ninth Circuit's Ruling.

Upon *de novo* review, the Ninth Circuit reversed in part and affirmed in part the District Court's two rulings. Specifically, consistent with this Court's

plurality opinion in *Chavez v. Martinez*, 538 U.S. 760 (2003) – which found a violation of the right against self-incrimination occurs if one has been compelled to be a witness against himself in "any criminal case" – the Ninth Circuit held that all three pre-trial proceedings in which Michael's and Aaron's statements were used were part of the "criminal case" against them and supported a Fifth Amendment cause of action. (App. 36-45.)

The Ninth Circuit similarly reversed the District Court, holding instead that the Petitioners' brutal and coercive conduct – meant to overcome the will of adolescent boys – amounted to "psychological torture" and sufficiently "shocked the conscience" to support a Fourteenth Amendment Due Process claim. (App. 45-48.)

Furthermore, the Ninth Circuit reinstated other claims asserted against McDonough and Blum; the Crowes' deprivation of familial relationship claim based upon Michael's incarceration; and the Housers' deprivation of familial relationship claims based upon Aaron's incarceration. (App. 66-71.)

The Ninth Circuit, however, affirmed summary judgment as to all of Michael's and Aaron's Fourth Amendment violations (related to the existence of probable cause for their arrests and the searches of their homes); the Fourth Amendment conspiracy claim against McDonough; Michael's and Aaron's defamation claims against Prosecutor Stephan; Aaron's defamation claim against Blum; and all

claims against the municipal entity defendants. (App. 48-59, 68, 71-80.)

Finally, the Ninth Circuit affirmed the District Court's denial of summary judgment as to the Crowes' individual claims for Fourth Amendment violations arising out of their respective strip searches and drawing of blood samples; as well as their claims for wrongful detention and deprivation of familial companionship arising out of Michael and his sister, Shannon, being placed in protective custody. (App. 62-66.)

Petitioners thereafter petitioned the Ninth Circuit for rehearing and rehearing *en banc*, both of which were properly denied. (App. 6.)

III. REASONS FOR DENYING THE PETITIONS

A. Petitioners' Attempts to Manufacture Review of Respondents' Fifth Amendment Claims Has Recently Been Rejected by This Court and Should Be Rejected Again Now.

The Fifth Amendment provides that no person "shall be compelled *in any criminal case* to be a witness against himself." U.S. Const. amend. V (emph. added). This Court has emphasized that the "sole concern" of the Fifth Amendment is "to afford protection against being 'forced to give testimony leading to the infliction of penalties affixed to . . .

criminal acts.'" *Kastigar v. United States*, 406 U.S. 441, 444 (1972).

Petitioners claim that in the wake of the *Chavez* plurality opinion, there is an alleged "conflict" within the Circuit Courts about when, precisely, a "criminal case" begins. As Respondents here explain, that argument is nothing new, but rather is precisely the same argument the Escondido Petitioners raised as amicus in support of review of the Ninth Circuit's prior decision in *Stoot v. City of Everett*, 582 F.3d 910 (9th Cir. 2009), *cert. denied*, April 5, 2010. This Court rejected those same arguments *just over seven months ago*, and should do so again now.

Moreover, as Respondents further explain, this case presents a uniquely poor vehicle for review of the widespread application of Fifth Amendment protections, as it involves juvenile criminal defendants who this Court has mandated should be subject to different interrogation standards (*i.e.*, "the greatest care" standard under *In re: Gault*, 387 U.S. at 55) than their fully emancipated adult counterparts. Accordingly, as that "greatest care" standard necessarily overlays the Ninth Circuit's Fifth Amendment analysis, this case is an inappropriate platform from which to extrapolate legal concepts meant to apply to a much broader population of criminal defendants.

1. The Alleged Split Between the Circuit Courts Does Not Warrant This Court's Attention at This Time.

With great hyperbole, Petitioners claim that a "deep circuit split" exists by relying on decisions from four Circuits – the Third, Fourth, Fifth, and Sixth Circuits. They do so by cherry-picking language from a small collection of cases in those Circuits which have never squarely addressed the "criminal case" question post-*Chavez*, as have the Second, Seventh, and Ninth Circuits. As set forth more fully below, the language on which Petitioners rely either pre-dates *Chavez*, or is *dicta* (not binding on future decisions in those Circuits) wrested from factually distinguishable decisions. Consequently, it remains unclear whether those Circuits would hold differently if they were actually confronted with the same compelling factual scenario presented in this case.

a. The Third Circuit.

For example, in the Third Circuit decision of *Renda v. King*, 347 F.3d 550, 553 (3rd Cir. 2003), the plaintiff was charged with giving false reports to law enforcement authorities. The Court of Common Pleas suppressed the plaintiff's statements due to *Miranda* violations and the case was *nolle prossed* by the District Attorney for lack of evidence. *Id.* The plaintiff filed an action pursuant to 42 U.S.C. § 1983 alleging, among other things, a violation of her Fifth Amendment rights. The Third Circuit held that the plaintiff's Fifth Amendment rights were not violated

because her statements were never used against her at trial. *Id.* at 559. In doing so, however, the Third Circuit failed to engage in any substantive analysis of the issue now presented to the Court. The decision simply states on this issue: " . . . our prior decision in *Giuffre* compels the conclusion that it is the use of coerced statements during a criminal trial, and not in obtaining an indictment, that violates the Constitution." *Id.*

Notably, however, *Giuffre v. Bissell*, 31 F.3d 1241 (3rd Cir. 1994), upon which *Renda* relied, was a pre-*Chavez* case. Additionally, as correctly pointed out by the Seventh Circuit in the subsequent, post-*Chavez* decision of *Sornberger v. City of Knoxville, Ill.*, 434 F.3d 1006 (7th Cir. 2006), *Giuffre* was "decided before the Supreme Court determined in *Dickerson v. United States*, 530 U.S. 428 (2000), that the *Miranda* warnings themselves have constitutional status." *Id.* at 1025. The Seventh Circuit concluded therefore that "little weight" should be placed on the holding in *Giuffre*, given that subsequent change in the law. *Id.* Furthermore, *Giuffre* was factually similar to *Chavez* in that officers obtained a statement from the plaintiff during an allegedly coerced interrogation but charges were later dropped prior to the filing of a criminal case. *Id.* at 1244. Here, in contrast, Aaron's coerced statements were used in bringing criminal charges against him, in denying his pre-trial release, and in deciding whether to try him as an adult.

In short, the *Renda* decision relied entirely on a distinguishable pre-*Chavez* decision which failed to

set forth any detailed analysis to support its conclusion that a Fifth Amendment violation occurs only when a statement has been used at *trial*. As such, *Renda* does not present a proverbial "split" among the Circuits at all, let alone one that is sufficiently mature to warrant this Court's attention now. Indeed, faced with facts similar to those presented in this case – and given the guidance this Court has provided since in *Chavez* – it cannot be said with any degree of certainty that the Third Circuit would not agree with the Ninth Circuit's decisions in both *Stoot* and this case.

b. The Fourth Circuit.

Similarly, in the Fourth Circuit decision of *Burrell v. Virginia*, 395 F.3d 508, 510 (4th Cir. 2005), an officer approached the plaintiff at a traffic accident scene. When the plaintiff refused to answer any of the officer's questions, he was charged with obstruction of justice and operating an uninsured motor vehicle. *Id.* at 511. When the plaintiff's conviction on those charges was later overturned on appeal, he brought a § 1983 action alleging, among other things, his Fifth Amendment rights were violated by the state compelling him to produce evidence of insurance. *Id.*

The Fourth Circuit analyzed the plaintiff's claim under *Chavez* noting that this Court's plurality conclusion that a violation of the constitutional right of self-incrimination occurs *only* if one has been compelled to be a witness against himself in a criminal

case. *Id.* at 513, citing *Chavez,* 538 U.S. at 770. The *Burrell* court then focused on Justices Souter's and Breyer's concurrence in *Chavez* which concentrated on whether a violation required "*courtroom use* of a criminal defendant's compelled, self-incriminating testimony. . . ." *Id.*, citing *Chavez,* 538 U.S. at 777 (emph. in orig.). Based on that reasoning alone, *Burrell* concluded "[Plaintiff] does not allege any *trial* action that violated his Fifth Amendment rights: thus, *ipso facto,* his claim fails on the plurality's reasoning." *Id.* But closer scrutiny reveals that *Burrell's* statement regarding requirement of a "trial" action is pure *dicta*. Indeed, the plaintiff in *Burrell* never alleged any "courtroom use" of statements since he only asserted a violation occurred at the time summonses were issued by the state. *Id.* Thus, that language, as it related to the question presented by the limited facts of that particular case, went well beyond those facts and consequently, would not be binding on subsequent cases.

In fact, the Seventh Circuit in *Sornberger,* which reached the same conclusion as the Ninth Circuit in this case, explained why that isolated language in *Burrell* created no conflict with its own holding:

> We do not see conflict between our holding today and that of our sister circuit in *Burrell.* There, Burrell claimed that his constitutional rights were violated when the police issued him an obstruction of justice summons for invoking his right to remain silent. The Fourth Circuit held that the issuance of

> a summons was not a "*courtroom use* of a criminal defendant's compelled, self-incriminating testimony," and therefore Burrell failed to state a claim under § 1983 for violation of his right against self-incrimination. Here, by contrast, Teresa's confession was used at a preliminary hearing to find probable cause to indict, to arraign and to set her bail. More than the mere issuance of a summons, failure to administer Teresa *Miranda* warnings led to three distinct "courtroom uses" of her unwarned statements.

Sornberger, 434 F.3d at 1027.

Consequently, it is entirely unclear whether the Fourth Circuit would hold differently given the facts of this case. Indeed, like the situation in *Sornberger* and unlike the situation in *Burrell,* the coerced statements used against Aaron formed the basis for filing formal charges against him, were used to determine his pre-trial custody status, and led to Aaron being tried as an adult, all "courtroom uses." As such, the "courtroom use" of the statement that was entirely lacking in *Burrell* is fully present in this case, as it was in *Sornberger*. Accordingly, the Fourth Circuit's decision in *Burrell* does not present a split among the Circuits, but must be viewed as limited to the facts before it, which are clearly distinguishable from those found in this case.

c. The Fifth Circuit.

In the Fifth Circuit's decision of *Murray v. Earle*, 405 F.3d 278 (5th Cir. 2005), the plaintiff (a juvenile) was charged with capital murder and injury to a child. The plaintiff's statements, obtained without taking her before a magistrate or notifying her parents or an attorney as required by Texas law, were used against her during two different trials leading to her conviction. *Id.* at 284. The Texas Court of Appeals, however, reversed those convictions due to improperly acquired statements. *Id.* The plaintiff subsequently brought a § 1983 action alleging, among other things, a violation of her Fifth Amendment rights. *Id.*

When the plaintiff challenged the trial court's grant of qualified immunity, the Fifth Circuit stated: "The Fifth Amendment privilege against self-incrimination is a fundamental trial right which can be violated only at trial, even though pre-trial conduct by law enforcement officials may ultimately impair that right." *Id.* at 285. The *Murray* court, however, provided no analysis regarding the question presented in this case, or clarified by the *Chavez* plurality: *pre-trial use of coerced statements within the criminal case*. Indeed, as in *Burrell,* that statement was circumscribed by the facts before it, as the plaintiff's confession in *Murray* had, in fact, been used *two different times* against her at trial. *Id.* at 284. Thus, *Murray* cannot be reasonably construed as going beyond its limited facts to reach a scenario where, like here, those same self-incriminating

statements are used in various pre-trial proceedings which implicate substantial liberty interests. Indeed, if confronted with the significantly distinguishable facts present in this case, it is unclear whether the Fifth Circuit would hold any different than the Ninth Circuit did in this case, or be bound by the factually dissimilar situation presented in *Murray*.

d. The Sixth Circuit.

Finally, in *McKinley v. City of Mansfield,* 404 F.3d 418, 425 (6th Cir. 2005), the self-incriminating statements in question were introduced at trial and played a "central role" in the plaintiff's conviction. Consequently, the *McKinley* court's recitation of the rule (in a mere footnote, no less) that the Fifth Amendment is a "trial protection" right was appropriate on the limited facts before it. But it does nothing to require a similar holding where another court in the Sixth Circuit is later confronted with the facts present in this case: pre-trial use of a self-incriminating statement within the confines of the criminal case.

Again, like the decision of the Fourth Circuit in *Burrell,* and the Fifth Circuit in *Murray,* the Sixth Circuit's mere recitation in *McKinley* of a "trial protection" rule – without any further analysis – does not define the contours of the Fifth Amendment in that Circuit, but must instead be viewed within the limited facts presented to the *McKinley* court. Indeed, none of the decisions on which Petitioners rely have

squarely addressed the different factual situation present here, and none would prohibit another court from ruling exactly as the Ninth Circuit did in this case if they are confronted with those distinguishable facts in the future.

In contrast, every Circuit which has squarely addressed pre-trial use of self-incriminating statements in the "criminal case" has uniformly followed this Court's guidance in *Chavez* and found such use to violate the Fifth Amendment. See, *e.g.*, *Sornberger,* 434 F.3d at 1026; *Higazy v. Templeton,* 505 F.3d 161, 172 (2nd Cir. 2007); *Stoot,* 582 F.3d at 925-926. There is no reason to believe the results would be any different if (and when) the Third, Fourth, Fifth and Sixth Circuits have the opportunity to confront that same issue. But until they do – and render a decision on similar facts which is actually at odds with the decisions of the Second, Seventh, and Ninth Circuits – any alleged "conflict" raised by the Petitioners is simply non-existent, let alone sufficiently mature at this juncture to warrant this Court's attention.

2. The Compelling Facts of This Case Make It a Uniquely Poor Vehicle for Review of the Widespread Application of Fifth Amendment Protections.

As mentioned at the outset of this brief, one of the most compelling aspects of this case is that it involves juveniles (boys, ages 14 and 15) – with no

prior criminal history or contact with the police – who were subjected to hours of coercive interrogation *before* they were ever apprised of their *Miranda* rights. While Petitioners pay lip service to this fact, they just as quickly go on *to forget* Respondents' relative youth, condoning inquisitorial techniques and practices which have been found to be appropriate, if at all, for adult criminal suspects.

But the standards for exercising the "greatest care" in analyzing police interrogations of juveniles are well-established, and run directly contrary to the authority relied upon by Petitioners. Indeed, as this Court made clear over a half-century ago in *In re: Gault*:

> We appreciate that *special problems* may arise with respect to waiver of the [Fifth Amendment] privilege by or on behalf of children, and that there may well be some differences in technique – but not in principle – depending upon the age of the child and the presence and competence of parents . . . , the *greatest care* must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.

In re: Gault, 387 U.S. at 55 (emph. added).

There can be no doubt that those "special problems" – as well as the established body of law from this Court and others which deal specifically with the

care which must be afforded juvenile criminal defendants in custodial interrogations – properly influenced the Ninth Circuit's analysis of Aaron's Fifth Amendment claims, and would do the same if this Court were to review this case. Consequently, the "special problems" inherent in addressing a juvenile case, and the unique and compelling factual issues involved in this case, make it an inappropriate vehicle for resolving the questions presented.

3. Petitioners' Claim That the Ninth Circuit's Decision Will Have a "Chilling Effect" on Law Enforcement Activities Is Supported Neither By Fact Nor Law.

In a reprise of the unsuccessful arguments they offered in the *Stoot* case, Petitioners again argue the Ninth Circuit's decision in this case will have a "chilling effect" on law enforcement activities. Specifically, Petitioners suggest that the Ninth Circuit's opinion creates an unworkable standard that will expose law enforcement officers to unnecessary lawsuits and civil liability, blithely characterizing this case as involving "garden variety" interrogation techniques, even where juveniles were involved.

Those arguments, however, presuppose that law enforcement officers do not have to follow rules applicable to interrogations and that if they do not, there will be no repercussions. To the contrary, this Court's precedent, beginning with *Miranda* and

continuing to the present day, sets forth clear requirements for a proper interrogation. A law enforcement officer must follow those rules or face the consequences.

Here, the record aptly demonstrates how time and again, Petitioners deliberately flouted those rules by interrogating Michael and Aaron for hours, and only *Mirandizing* them at the end of those interrogations *after* they had overcome the boys' will and secured the confessions they were seeking. Consequently, Petitioners' arguments about the need for "proper guidelines" rings hollow when the record shows how *they deliberately violated the guidelines this Court has already provided in myriad cases.* Moreover, at the time Petitioners took that action, it was firmly established in the Ninth Circuit that the defense of qualified immunity is not available to police officers who knowingly violate the law. *Cooper v. Dupnick,* 963 F.2d 1220, 1251 (9th Cir. 1992), overruled on other grounds in *Chavez,* 538 U.S. 760. Rather than justifying protection for the proper exercise of their duties, when law enforcement officials act as they have in this case, "they invite redress under section 1983." *Id.* at 1252.

Petitioners' fall-back position – that the police cannot, as a matter of law, be found liable for any Fifth Amendment violation where prosecutors (and not they) introduce those coerced statements at trial – merits even less consideration. Such an argument lacks *any* legal support, and, in fact, has been squarely rejected by the very authority cited by

Petitioners. See *McKinley*, 404 F.3d at 436-437, fn. 23 (addressing the District Court's decision in this case and finding its reasoning wholly "unpersuasive"). *McKinley* then cited a long train of authority – including *Chavez* – where it has never been questioned that the police may be held liable under § 1983 for violating someone's Fifth Amendment rights. *Id.*

Indeed, as both the Sixth Circuit in *McKinley* and the Ninth Circuit in this case properly concluded, a rule barring suits against the police for Fifth Amendment violations *is a rule barring any suits for Fifth Amendment violations*, given that prosecutors are *absolutely immune* from suit for their conduct as advocates within the judicial process. *Id.* at 437-438, citing *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993).

But it cannot be – and in fact, has never been – that invasions of the right against compelled self-incrimination are not actionable. Consequently, Petitioners' assertions to the contrary should be rejected by this Court on that basis alone. (App. 42-44.)

In sum, as freedom from compulsion lies at the heart of the Fifth Amendment, no purpose would be advanced by making the police immune, as a matter of law, from the protections that Amendment provides. Indeed, if this were the case, the police would only be *encouraged* to compel coerced and self-incriminating statements with complete impunity. Surely, such a result would be wholly contrary to a

long train of well-settled authority meant to regulate and discourage such police misconduct under the aegis of the Fifth Amendment.

B. Petitioners' Arguments That There Is a Need to Clarify "Conscience Shocking" Behavior Under the Fourteenth Amendment Also Fails to Raise an Issue Worthy of This Court's Review.

1. This Court's Decisions Are Replete with Examples of Verbally Coercive Interrogations Which Violate the Fourteenth Amendment.

Petitioners assert that the Ninth Circuit's opinion in this case creates uncertainty and confusion about what conduct is sufficiently "conscience shocking" to warrant Fourteenth Amendment liability. They premise that argument on the assertion that "verbal" coercion and deception should not be enough, even where juveniles are the target of that coercion.

But over a half-century ago in *Haley,* this Court found that a 15-year-old boy – *based upon verbal coercion alone* – was necessarily ill-equipped to withstand an overnight police interrogation resulting in his coerced confession. *Haley,* 332 U.S. at 599-600. Writing for the Court, Justice Douglas reasoned that such a juvenile "cannot be judged by the more exacting standards of the law," and further observed "[t]hat which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early

teens." *Id.* Recognizing both that such a boy "questioned through the dead of night by relays of police, is a ready victim of the inquisition," and that while "mature men possibly might stand the ordeal . . . a lad of tender years is no match for the police in such a contest," the *Haley* court demanded that "*special care* in scrutinizing the record must be used" in order to protect the constitutional rights of juveniles, and to prevent the police from using custodial interrogations for "wringing confessions from them." *Id.* at 599-601 (emph. added).

Not 14 years later, in *Gallegos v. Colorado,* 370 U.S. 49 (1962), this Court was again called upon to scrutinize a confession wrought from a juvenile in the course of a custodial police interrogation. Finding that the youth of the accused – 14 years old – was a "crucial factor" in determining whether due process violations had occurred, the *Gallegos* court reasoned:

> [A] 14 year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. That is to say, we deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and is unable to know how to protect his own interests or how to get the benefit of his constitutional rights.

Id. at 1212.

Over the prosecution's continuing assertion that such youth and immaturity were "irrelevant" in light

of the allegedly "voluntary" nature of the confession made, the *Gallegos* court retorted:

> But if we took that position, it would, with all deference, be in callous disregard of this boy's constitutional rights. He cannot be compared with an adult in full possession of his senses, and knowledgeable of the consequences of his admissions.

Id. at 1212-1213.

Consequently, *Gallegos*, like *Haley* before it, concluded that "the formal confession on which this conviction may have rested was obtained in violation of due process." *Id.* at 1213.

Not four years later, the Court in *In re: Gault*, 387 U.S. 1, again stressed the importance that youth plays in determining whether a confession is coerced, and echoed the mandate that "the *greatest care*" must be taken to assure that juvenile confessions are "voluntary, in the sense not only that [they are] not coerced or suggested, but also that [they are] not the product of ignorance of rights or of adolescent fantasy, fright or despair." *Gault,* 387 U.S. at 55 (emph. added). That "greatest care" standard was based upon this Court's review of several lower court decisions confirming how juvenile confessions are often "the product of fear and fatigue due to extensive police grilling," and how "the frightening atmosphere of a police station is likely to have a harmful effect on the mind and will of the boy." *Id.* at 52-53 (internal quotes omitted). And so the *Gault* court, too,

concluded with the continuing recognition that "authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children." *Id.*

In the several decades since *Haley*, *Gallegos*, and *Gault*, other courts have universally followed this same line of reasoning, insisting that the law view juveniles differently than their adult counterparts.[5] Most notably, however, is the fact that the police conduct in those cases was "verbal," as it was in this case. Indeed, as this Court has repeated many times, coercion can be mental as well as physical, as "the blood of the accused is not the only hallmark of an

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[5] See, *e.g.*, *Woods v. Clusen*, 794 F.2d 293, 296-298 (7th Cir. 1986), (finding that various coercive police techniques – relays of police interrogators, lying about the state of the evidence, promises of leniency – violated a 16-year-old's Fourteenth Amendment rights, given his relative age, experience, and education); *Taylor v. Maddox*, 366 F.3d 992, 1013-1016 (9th Cir. 2004) (applying *Haley's "greatest care"* standard to reject a coerced confession wrought from a 16-year-old juvenile and ultimately finding that the police had clearly violated the juvenile's Fourteenth Amendment rights. Secondary authority is also in accord. See 87 A.L.R.2d 624, *Voluntariness and Admissibility of Minor's Confessions*; 82 N.C.L. Rev. 891, 944, *The Problem of False Confessions in the Post-DNA World*; see also 30 N.Y.U. Rev.L. & Soc. Change 209, *The Reality of False Confessions – Lessons of the Central Park Jogger Case* (recounting in chilling detail how and why five juvenile boys subjected to heavy-handed police interrogation techniques confessed their involvement in an infamous crime they did not commit, and were prosecuted and convicted on the basis of those confessions alone, until the real killer, a serial rapist and convicted murderer, confessed to the crime some thirteen years later.)

unconstitutional inquisition." See, *e.g.*, *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991); *Reck v. Pate*, 367 U.S. 433, 440-441 (1961); *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960).

Here, the Ninth Circuit concluded from the record before it that Michael's and Aaron's confessions were the product of "psychological torture," and that "[o]ne need only read the transcripts of the boys' interrogations, or watch the videotapes, to understand how thoroughly the defendants' conduct in this case 'shocks the conscience.'" (App. 47.)

On that record, and in light of the clearly established standards governing even verbal coercion which run through myriad decisions of this Court, there is absolutely no need for this Court's intervention at this time.

2. Petitioners' Companion "Shocks the Conscience" Arguments Warrant Even Less Scrutiny by This Court.

Petitioners badly mischaracterize the Ninth Circuit's opinion and the record below to float two companion arguments, neither of which warrants this Court's review. Specifically, Petitioners assert that a Fifth Amendment violation based upon coercive interrogation techniques, and a Fourteenth Amendment violation based upon deprivation of familial companionship, cannot be found absent conscience shocking behavior.

But those arguments belie the fact that the Ninth Circuit, in finding that Petitioners violated Michael's and Aaron's Fifth Amendment rights, necessarily relied upon the same conscience shocking behavior that also formed the basis for Petitioners' violation of the boys' Fourteenth Amendment rights. In other words, the same coercive interrogation techniques employed by Petitioners amounted to violations of *both* Constitutional protections, given the egregious nature of that conduct. That this is so does not indicate that this case is at variance with any other decisions, but merely reflects the compelling facts which were before the Ninth Circuit, implicating both Fifth Amendment and Fourteenth Amendment protections.

Similarly, Petitioners' assertion that a deprivation of familial companionship claim under the Fourteenth Amendment requires conscience shocking behavior – and not mere "unwarranted interference" – is also an inadequate grounds for review. Indeed, in this case, it was the Petitioners' conscience shocking and coercive interrogation tactics which the Ninth Circuit found to have caused Aaron's wrongful incarceration and concomitant separation from his family. (See App. 69 ["Because Michael's and Aaron's continued detentions were wrongfully justified by their illegally coerced confessions, we reverse"].) Thus, although the Ninth Circuit applied the proper standard in reinstating that familial relationship claim, even if it were to have applied the "conscience shocking standard" Petitioners espouse, *the outcome would*

have been exactly the same. Accordingly, there is no reason for this Court to intervene on facts which would compel the same outcome, irrespective of the standard applied.

C. The Ninth Circuit's Reversal of Summary Judgment on the Conspiracy Claim Asserted Against Blum Was Entirely Fact-Driven and Therefore Presents No Legal Issue for This Court to Clarify.

Blum's individual argument – that as a private citizen, he cannot be held liable for conspiracy to violate Michael's and Aaron's constitutional rights – is presented without regard to the controlling standard of review at summary judgment. Indeed, Blum recites at length improper factual findings made by the District Court as if they had been made after trial. In contrast, the Ninth Circuit simply determined that genuine questions of material fact exist regarding the level and extent of Blum's involvement which could not be determined at summary judgment, and reversed the District Court on that basis. (App. 66-68.)

Rather than running contrary to this Court's decision in *Richardson v. McKnight,* 521 U.S. 399, 412 (1997), that conclusion by the Ninth Circuit only confirms that Blum is not automatically entitled to § 1983 immunity merely because he is a private individual, as was his primary argument on appeal. Moreover, as Blum's own petition reveals, such a

holding is not a matter of controversy, but has been echoed in the decisions of "nearly every other Circuit Court" which has considered the issue. Thus, the compulsion for this Court's review is clearly lacking.

Perhaps more importantly, however, is the fact that the Ninth Circuit did not deny Blum qualified immunity based upon a "blanket prohibition" that private actors are never entitled to such immunity, as Blum contends. Indeed, the cases which Blum cites hold to the contrary. See, *e.g.*, *Franklin v. Fox,* 312 F.3d 423, 445 (9th Cir. 2002) (which Blum claims applied a "blanket denial of qualified immunity to [a] private individual," but which instead upheld the district court's grant of summary judgment upon a finding that no evidentiary basis existed for the conspiracy claim the plaintiff had asserted as the sole basis for § 1983 liability against that individual); *Clement v. City of Glendale,* 518 F.3d 1090, 1096-1097 (9th Cir. 2008) (which Blum also asserts demonstrates the Ninth Circuit's trend of "blanket denial" of qualified immunity to private individuals, but which instead extended immunity to a private towing company under *Richardson's* "good faith" defense to § 1983 liability).

In any event, notwithstanding whatever post-*Richardson* "blanket prohibition" Blum believes he may have discerned from those decisions, *no such automatic rule played any role here.* Instead, the Ninth Circuit simply concluded that the record evidence regarding Blum's involvement raised factual

questions which could not be properly determined at summary judgment:

> The record shows that the quality of Blum's involvement in the interrogations is not categorically inconsistent with a tacit "meeting of the minds." According to one of the detectives, Blum helped the police formulate a "tactical plan" to approach the interview. Moreover, the detectives "pretty much" followed his advice after these consultations. Insofar as these tactics and lines of questioning by the detectives shock the conscience, as demonstrated above, summary judgment in favor of Blum is unwarranted.

(App. 67.)

Thus, in determining that a meeting of the minds could be inferred from the circumstantial evidence (including Blum's involvement in the interrogations and in formulating and directing the tactical plan), the Ninth Circuit reasoned that the evidence was sufficient for a reasonable factfinder to conclude it was "unlikely to have been undertaken without an agreement." (App. 67-68.) On that basis alone, the Ninth Circuit quite correctly reversed summary judgment as to Blum. There is nothing controversial about that proper application of well-settled summary judgment standards. Consequently, there is no issue of law for this Court to clarify now.

IV. CONCLUSION

Petitioners have not established any compelling reasons for this Court to grant their various petitions. For the foregoing reasons, Respondents respectfully request this Court to deny those petitions.

Respectfully submitted,

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CHRISTOPHER MCDONOUGH,

Petitioner,

vs.

MICHAEL CROWE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CONSOLIDATED REPLY TO OPPOSITIONS TO PETITION FOR WRIT OF CERTIORARI

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REASONS TO GRANT PETITION

Fifth Amendment. The Court should grant review to resolve the circuit conflict concerning whether use of coerced testimony in pretrial criminal proceedings violates the Fifth Amendment. Respondents' suggestion there is no conflict is belied by the case law. And Respondents' insistence this case is a poor vehicle for resolving the conflict since it involves minors, is belied by logic: That minors are involved has no bearing on whether pretrial use of coerced testimony constitutes a "use" violation of the Fifth Amendment.

The Court should also grant review to delineate what constitutes coercive interrogation of a minor under the Fifth Amendment. Respondents' claims against Petitioner Christopher McDonough are very narrow, largely confined to his having deceived the minor plaintiffs during interrogation – a well established, judicially sanctioned interrogation technique. If such tactics violate the Fifth Amendment, or if there are special rules for minors, police departments and their officers must know. Can officers ever deceive minor suspects? If so, when? Such interrogations are a daily part of law enforcement practice and clear guidelines are essential, both to avoid potential liability and to assure admissible evidence in criminal proceedings.

Fourteenth Amendment. Review is also necessary to resolve what type of conduct violates the Fourteenth Amendment. McDonough did not raise his

voice or threaten the suspects in any way. As noted, Respondents' chief complaint is that McDonough lied to the minor plaintiffs. The Ninth Circuit concluded this alleged conduct "shocked the conscience" and thus exposed McDonough to liability under the Fourteenth Amendment. In response, Respondents neglect even to mention the bevy of cases establishing that, in so holding, the Ninth Circuit has parted company with this Court's precedents and the law of other circuits.

Finally, review is necessary to bring the Ninth Circuit into line with every other circuit regarding the standards for establishing a substantive due process claim for deprivation of familial companionship. The Ninth Circuit expressly repudiated this Court's holding that *any* Fourteenth Amendment substantive due process claim hinges on whether the challenged conduct "shock[s] the contemporary conscience." *See County of Sacramento v. Lewis*, 523 U.S. 833, 836, 847 n.8 (1998). Respondents' only answer is that even if the Ninth Circuit applied the incorrect standard, it was not prejudicial because the result would have been the same under the correct standard. As noted however, even under the "shocks-the-conscience" standard there should be no liability here. But in any event, the confusion sowed by the Ninth Circuit's published opinion exists regardless of prejudice. The Court should eliminate that confusion by resolving the conflict.

I. THIS CASE PRESENTS A PROPER VEHICLE TO RESOLVE THE INTER-CIRCUIT CONFLICT REGARDING WHETHER USE OF COERCED TESTIMONY IN PRETRIAL PROCEEDINGS VIOLATES THE FIFTH AMENDMENT.

To provide government officials with guidance regarding the circumstances under which they may use a suspect's testimony, the Court should resolve the circuit conflict concerning whether use of coerced testimony in pretrial criminal proceedings violates the Fifth Amendment. (McDonough Cert. Petition ["McDonough"] 16-22.)

Respondents insist that there is no split among the circuits or, in any event, that this case presents a poor vehicle for resolving it. They are wrong.

A. The Third And Fourth Circuits Have Rejected Fifth Amendment Claims Based On Pretrial Use Of A Suspect's Statements.

Respondents agree that the Second, Seventh and Ninth Circuits have held that use of a suspect's coerced statement at *any* criminal proceeding violates the Fifth Amendment. (Houser Opp. 20-27.) But they insist the Third and Fourth Circuits have never taken the opposite view. (*Id.*)

In fact, the Third and Fourth Circuits have squarely held that pretrial use of coerced testimony

does not violate the Fifth Amendment. (*See* McDonough 17-18, citing *Renda v. King*, 347 F.3d 550 (3d Cir. 2003); *Burrell v. Virginia*, 395 F.3d 508 (4th Cir. 2005).)

Boiled down, Respondents' response is that one circuit got the law wrong and the other dealt with distinguishable facts. Respondents argue that review is unnecessary because both circuits might agree with the Ninth Circuit if confronted with the facts here. (Houser Opp. 21-24.)

But it is far from clear that the Third and Fourth Circuits would have found a violation here. Both Circuits considered *Chavez v. Martinez*, 538 U.S. 760 (2003) and then rejected use violation claims in *broad* language limiting the Fifth Amendment to use of testimony at trial. *Renda*, 347 F.3d at 559 ("it is the use of coerced statements during a criminal trial, and not in obtaining an indictment, that violates the Constitution"); *Burrell*, 395 F.3d at 514 (plaintiff's claim failed under the *Chavez* plurality opinion because "[h]e does not allege any *trial* action that violated his Fifth Amendment rights").

The district courts in eight states are bound by that language. If, as Respondents contend, that language results from weak reasoning or dictates the wrong result, this Court's review is necessary to correct it. But the fact remains: The split among the circuits is real and requires the Court's attention.

Moreover, the Third and Fourth Circuit cases conflict more directly with the Ninth Circuit's opinion in this case than Respondents acknowledge.

Renda v. King. The Third Circuit recognized that *Chavez* left open the question of when a criminal proceeding commences for purposes of the Fifth Amendment "use" violation inquiry. *Renda*, 347 F.3d at 559. Without guidance from this Court, the Third Circuit based its decision on its own precedent, *Giuffre v. Bissell*, 31 F.3d 1241 (3d Cir. 1994), holding that use of coerced statements to obtain an indictment does not violate the Fifth Amendment. Respondents' attacks on that conclusion go to the merits of the issue that McDonough has presented for review, not to whether the issue warrants this Court's attention.

In any event, Respondents' attacks on *Renda*'s reasoning lack merit. Specifically, Respondents emphasize that *Giuffre* predates *Dickerson v. United States*, 530 U.S. 428 (2000), a *Miranda* case. (Houser Opp. 21.) But *Renda* expressly held that *Giuffre* remained good law after *Dickerson* and *Chavez*. *Renda*, 347 F.3d at 557-58. ("[I]n light of the Supreme Court's recent decision in *Chavez*, it is clear that *Giuffre* still is good law following *Dickerson*, and that the District Court properly ruled that questioning a plaintiff in custody without providing *Miranda* warnings is not a basis for a § 1983 claim as long as the plaintiff's statements are not used against her at trial").

Respondents also emphasize that in *Giuffre*, the charges were dropped prior to the filing of a criminal case. (Houser Opp. 21.) But it is the facts of *Renda*, not of *Giuffre*, that matter here. And in *Renda*, the plaintiff was arrested, arraigned, and incarcerated based on her coerced testimony. *Renda*, 347 F.3d at 553; *see also id.* at 559-60. Thus, *Renda* stands in stark contrast to the present case, where the Ninth Circuit held that pretrial use of coerced testimony violates the Fifth Amendment.

Burrell v. Virginia. The Fourth Circuit case, *Burrell*, also creates a clear circuit split. Contrary to Respondents' description, *Burrell* expressly relied on the *Chavez* plurality's reasoning: The Fourth Circuit explained that the *Chavez* plurality found no "use" violation because the compelled testimony was not admitted in court, and that Justice Souter's concurrence found no use violation because the plaintiff had failed to make a showing justifying the attachment of civil liability to police interrogations. 395 F.3d at 513. *Burrell* then concluded, "[o]n the reasoning of either the *Chavez* plurality or Justice Souter's concurrence in the judgment, Burrell's Fifth Amendment section 1983 claim fails to state a claim." *Id.* at 514.

Thus, *Burrell*'s conclusion that the plaintiff's Fifth Amendment claim failed under the *Chavez* plurality's reasoning because he "does not allege any *trial* action that violated his Fifth Amendment rights" (*id.*), directly conflicts with the Ninth Circuit's conclusion here.

B. This Case Presents An Excellent Vehicle For Resolving The Circuit Conflict.

Respondents suggest this case is a poor vehicle for reviewing the Fifth Amendment questions because it involves juvenile suspects, who are subject to different – and more stringent – interrogation standards than their fully emancipated adult counterparts. (Houser Opp. 19.)

Respondents' argument is a non sequitur. The fact that police must take great care when interrogating minors to avoid coercing confessions has no bearing on whether pretrial use of coerced testimony constitutes a "use" violation under the Fifth Amendment. Whether pretrial use of coerced testimony is permissible depends on how the Court construes the word "use" in the Fifth Amendment, not on the age of the suspects.

Finally, Respondents point out that just seven months ago, this Court declined to grant a petition for writ of certiorari in *Stoot v. City of Everett*, 582 F.3d 910 (9th Cir. 2009), cert. denied, April 5, 2010. (Houser Opp. 19.) But the fact that the same issue has arisen in two cases from a single Circuit in consecutive terms illustrates the recurring nature of Fifth Amendment claims premised on pretrial use of a suspect's testimony.

In the seven years since *Chavez*, five circuits have split on whether pretrial proceedings constitute a "criminal case" for purposes of the Fifth Amendment.

The Court should resolve the conflict and bring certainty to an area of the law impacting the daily work of police departments and prosecutors across the country.

II. REVIEW IS NECESSARY TO RESOLVE THE INTER-CIRCUIT CONFLICT REGARDING WHAT CONSTITUTES COERCIVE INTERROGATION OF A MINOR SUSPECT UNDER THE FIFTH AMENDMENT.

The Court should also grant review to resolve the circuit split regarding whether the routine interrogation techniques that McDonough employed here constitute coercion for Fifth Amendment purposes. (McDonough 22-29.) McDonough's tactics – accusing the suspect of lying, implying that others have implicated the suspect and touting the accuracy of the CVSA machine – have garnered widespread judicial acceptance. By concluding these techniques run afoul of the Fifth Amendment, the Ninth Circuit's decision has thrown the law into disarray.

Respondents argue – without any case citations – that Petitioners' arguments "presuppose that law enforcement officers do not have to follow the rules applicable to interrogations and that if they do not, there will be no repercussions." (Houser Opp. 29.) But what those "rules applicable to interrogations" might be, Respondents do not say.

And, in fact, while the Court has spoken generally of the need to treat the interrogation of minors with greater sensitivity than the interrogation of adults, it has *never* delineated whether and when the routine techniques that McDonough employed here constitute coercion.

The Ninth Circuit's decision even casts doubt on what constitutes compelled testimony. As Respondents correctly acknowledge, "freedom from compulsion lies at the heart of the Fifth Amendment." (Houser Opp. 31.) Yet here, the *sine qua non* of compulsion – overriding the suspect's will – is absent. McDonough's interrogations yielded no confession from either suspect.

Respondents take McDonough to task for using deception in his interrogations. (*See* Houser Opp. 9-10, 11-12.) But lying to a suspect is a judicially-sanctioned interview technique. So the question remains: What kind of rule do the Respondents and the Ninth Circuit propose? Can an officer never lie to a minor? Sometimes? And if so, when? The answers to these questions are essential to the day-to-day work of police across the country, both for purposes of avoiding civil liability and assuring admissibility of evidence in criminal proceedings. The "I-know-it-when-I-see-it-standard" that the Ninth Circuit has effectively imposed here does not help officers in practice. To avoid inadvertently violating the Fifth Amendment, officers need clear guidance on what interrogation techniques are permissible.

At the very least, the Court should grant review to reaffirm that officers who use routine police interrogation techniques and who do not actually compel testimony are entitled to qualified immunity. Ample case law approves the interrogation techniques used in the present case. (*See* McDonough 24-25.) Accordingly, no reasonable police officer would have known in advance that the type of accepted police practices utilized here would subsequently be deemed improper. (*Id.* at 28-29.)

In response, Respondents ignore the case law condoning the exact interrogation techniques used in the present case. Instead, they state *ipse dixit* that "no purpose would be advanced by making the police immune, as a matter of law, from the protections that [the Fifth] Amendment provides." (Houser Opp. 31.) This is no response at all.

III. THE COURT SHOULD RESOLVE THE INTER-CIRCUIT CONFLICT REGARDING WHETHER PURELY VERBAL CONDUCT NOT INCLUDING THREATS VIOLATES THE FOURTEENTH AMENDMENT.

The Ninth Circuit's opinion also represents a stark departure from the voluminous case law of this Court and of other circuits establishing that purely verbal conduct devoid of any threats of harm does not "shock the conscience" and therefore subject a police officer to Fourteenth Amendment liability. (*See* McDonough 29-41.)

In response, Respondents *ignore* the voluminous case law establishing that where the police conduct at issue is not physical, the "conscience-shocking" standard is nearly impossible to meet. (*See* Crowe Opp. 24-25; Houser Opp. 32-36.) Instead, they cite a series of cases discussing whether a given statement by a juvenile suspect was admissible at trial. (Houser Opp. 32-36, citing *Haley v. Ohio*, 332 U.S. 596 (1948) (reversing conviction where suspect's coerced testimony was used at trial); *Gallegos v. Colorado*, 370 U.S. 49 (1962) (same); *In re Gault*, 387 U.S. 1 (1967) (same).)

But whether a statement has been coerced and thus is inadmissible at trial is a distinctly different question than that posed here: Whether purely verbal conduct devoid of any threats can subject an officer to liability for civil damages under the Fourteenth Amendment. The standards for the two questions are decidedly different. A statement can be coerced, and thus inadmissible pursuant to the Fifth Amendment's guarantee against self-incrimination, without rising to the level of a violation of the Fourteenth Amendment. *Compare Cunningham v. Wenatchee*, 345 F.3d 802, 810 (9th Cir. 2003) (interview is coercive where "the officer's tactics undermined the suspect's ability to exercise his free will") *with Fontana v. Haskin*, 262 F.3d 871, 882 n.7 (9th Cir. 2001) (to violate Fourteenth Amendment, interview tactics must be "'so egregious, so outrageous, that [they] may fairly be said to shock the contemporary conscience'").

These different standards make sense. Where a suspect's coerced testimony is used at trial, the Fifth Amendment provides the avenues for redress – either by providing a basis for reversing the conviction or by providing a basis for the suspect to seek civil damages. But where the suspect's testimony is *not* used at trial, the more stringent standards embodied by the Fourteenth Amendment must be met before he can obtain civil damages.

Given these different standards, the case law cited by Respondents discussing whether an interrogation resulted in coerced testimony that was inadmissible at trial, provides no basis for concluding that the Ninth Circuit's opinion here – holding that purely verbal conduct is sufficient to constitute a Fourteenth Amendment violation – is anything other than a departure from this Court's precedents and the precedents of the other circuits.

The confusion wrought by such amorphous due process claims is underscored by Respondents' claims against McDonough. Respondents fault McDonough for deceiving the juvenile suspects. (*See* Houser Opp. 32.) But case law sanctions lying to a suspect. Thus, the Ninth Circuit's decision radically lowers the bar for what violates the Fourteenth Amendment – it casts doubt on whether conduct that may not even constitute coercion suffices. By suggesting that an officer cannot lie to a juvenile suspect without exposing himself to liability under the Fourteenth Amendment, the Ninth Circuit's opinion creates uncertainty

regarding what police can do. Can an officer ever lie? If it is sometimes permissible for an officer to lie, under what circumstances is it permissible? What kind of deception rises to the level of a substantive due process violation?

Respondents are correct (Houser Opp. 36), that the Ninth Circuit concluded that these interrogations could violate the Fourteenth Amendment. But both the district court and the trial court (in the underlying criminal case) listened to the same tape recordings of the interviews and found that McDonough's conduct was not extreme or outrageous. This disparity evidences the problem with the Ninth Circuit's decision: Law enforcement agencies and officers across the country will be subject to litigation on the basis of vague standards that vary from courtroom to courtroom. The Court should grant review to eliminate the amorphous tort the Ninth Circuit created here.

At least, the Court should grant review to make it clear that McDonough, and police officers like him, are entitled to qualified immunity for the conduct at issue here. No reasonable officer would have believed that McDonough's calm, measured tone and relatively innocuous questions constituted a "conscience-shocking" interrogation. (McDonough 38-41.) Respondents offer no response to McDonough's contention that he is entitled to qualified immunity.

IV. REVIEW IS NECESSARY BECAUSE THE NINTH CIRCUIT REJECTED THE WELL-ESTABLISHED "SHOCKS-THE-CONSCIENCE" STANDARD AS TO FOURTEENTH AMENDMENT CLAIMS FOR DEPRIVATION OF FAMILIAL RELATIONSHIP.

The Court should grant review because the Ninth Circuit has expressly rejected the "shocks the conscience" standard that has long been the threshold requirement for all Fourteenth Amendment violations. *See Lewis*, 523 U.S. at 846-49 & n.8. (*See* McDonough 41-43.)

The Crowe Respondents respond by stating *ipse dixit* that, "The Ninth Circuit used the correct legal standard ('unwarranted interference') for interference with family relations and the Petition does not show compelling reasons to grant certiorari to decide this question." (Crowe Opp. 25.) But as demonstrated, this isn't true.

The Houser Respondents respond to the Ninth Circuit's rejection of the "shocks-the-conscience" standard by arguing that even if the Ninth Circuit erred, "the outcome would have been exactly the same" had it used the correct standard. (Houser Opp. 37-38 (emphasis omitted).) However, as noted, the Ninth Circuit's application of the "shocks the conscience" test is dubious here. And in any event, regardless of prejudice, the fact remains that the Ninth Circuit has espoused a standard in a published

opinion that is squarely at odds with the "shocks-the-conscience" standard that has long been the threshold requirement for all Fourteenth Amendment violations. It is essential that the Court resolve the conflict and eliminate the confusion.

CONCLUSION

For the foregoing reasons, Petitioner urges that the petition be granted.

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Respectfully submitted,

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